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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 1328

KAISER STEEL CORPORATION,
a Nevada Corporation,
Petitioner,

vs.

W. S. RANCH COMPANY,
a New Mexico Corporation,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner prays that a Writ of Certiorari issue to review the Order of the United States Court of Appeals for the Tenth Circuit denying Petitioner's Motion to Stay Proceedings, entered February 1, 1968, after its Order dated October 12, 1967, reversing the Judgment of the District Court.

CITATIONS TO OPINIONS BELOW

The opinion of the United States District Court for the District of New Mexico is printed in Appendix B hereto, *infra*, p. A4. The opinion of the United States Court of Appeals for the Tenth Circuit reversing the District Court's decision is printed in Appendix B hereto, *infra*, p. A10, and reported in 388 F.2d 257. The Order of the Court of Appeals denying Petitioner's Motions for rehearing and to stay proceedings, and the dissenting opinion of Judge Brown, Chief Judge, United States Court of Appeals, Fifth Circuit, sitting by designation, is printed in Appendix B hereto, *infra*, p. A20, and reported in 388 F.2d 262. The opinion of the New Mexico Supreme Court in a related case between the same parties and affirming approval of Petitioner's application to change the point of diversion of the water rights involved herein is printed in Appendix B, hereto, *infra*, p. A30.

JURISDICTION

The Order of the Court of Appeals reversing the Judgment of the District Court was entered October 12, 1967, and the Motion to Stay Proceedings pending determination of a declaratory judgment action in the State Courts of New Mexico, was denied February 1, 1968. Jurisdiction of this Court is invoked under 28 U.S.C., Sec. 1254 (1).

QUESTION PRESENTED

In a diversity suit, should the Court of Appeals have stayed further proceedings, in order to allow the New Mexico Courts, in a case pending therein, to decide whether a state statute granting the power of eminent domain to private as well as public entities, thereby permitting condemnation of rights-of-way for the conveyance of water

for application to beneficial use, violates the State Constitution, where there are no New Mexico decisions directly in point and the issue is of vital importance to the State of New Mexico?

STATUTES INVOLVED

The provisions of the New Mexico Constitution involved are Art. II, Sec. 20, and Art. XVI, Secs. 1-3, printed in Appendix A hereto, *infra*, p. A1. The statutory provisions involved are N.M.S.A., Sec. 75-1-3 (1953), N.M.S.A., Sec. 68-2-1 (1953), and N.M.S.A., Sec. 22-9-22, printed in Appendix A hereto, *infra*, pp. A1-A3.

STATEMENT

Respondent filed a diversity suit in the United States District Court for the District of New Mexico for damages and permanent injunctive relief, alleging that Petitioner trespassed upon Respondent's land, drilled stream diversion wells, and laid a water pipeline thereon (Tr. 2, R. 1-3). Petitioner moved to dismiss upon the ground that New Mexico's inverse condemnation statute, N.M.S.A., Sec. 22-9-22 (1967 Supp.), as construed in *Zobel* v. *Public Service Co.*, 75 N.M. 22, 399 P.2d 922 (1965), was Respondent's exclusive remedy. By Affidavit, Petitioner showed that it is the Lessee of lands in Colfax County, New Mexico, upon which a coal processing plant had been constructed, and is the owner of recognized water rights for beneficial use at its coal processing plant, approved by the New Mexico State Engineer (Tr. 2, R. 13; See also, *W. S. Ranch Co.* v. *Kaiser Steel Corp.*, N.M. Sup. Ct. No. 8368, March 18, 1968, 6 N.M. State Bar Bull. 471, printed in Appendix B, *infra*, p. A30); that the diversion wells and pipeline are located entirely within the right-of-way of the Atchison, Topeka & Santa Fe Railway branch line, and that to allow

beneficial use of the waters necessary for operation of the plant, the diversion wells and pipeline must be upon and must cross Respondent's property.

In its Brief in the District Court, Petitioner requested the District Judge, if he doubted Petitioner's power of eminent domain, to stay the action pending resolution of that question by the State Court (Supp. Tr. 1).

Section 75-1-3 (N.M.S.A. 1953) expressly authorizes condemnation of private land for the conveyance of water for its application to beneficial use, and Petitioner's use of the water is clearly a beneficial use. See *W. S. Ranch Co.* v. *Kaiser Steel Corp.*, N.M. Sup. Ct., March 18, 1968, *supra*. The issue was thus narrowed to whether Section 75-1-3 violates Art. II, Sec. 20 of the New Mexico Constitution, prohibiting the taking of private property for public use without just compensation, and specifically whether the taking was for a "public" use.

The District Court held that the condemnation of land for purposes of distributing water to a beneficial use was a taking for public use under New Mexico law and held the statute constitutional. The Court concluded that since Petitioner had the right to exercise the power of eminent domain, Respondent's exclusive remedy was New Mexico's inverse condemnation statute, Section 22-9-22, *supra* (Tr. 2, R. 14-19). From an Order dismissing the action (Tr. 2, R. 20), Respondent appealed to the United States Court of Appeals for the Tenth Circuit (Tr. 2, R. 21).

On October 12, 1967 (Tr. 4), the Tenth Circuit reversed the District Court. While conceding that the question had never been presented to the New Mexico Courts and that its decision "must necessarily have a far-reaching effect," the Court reasoned that "public use" must be measured

by "ultimate use"; that the use of water for coal mining purposes was not a "public use" and, therefore, the statute was unconstitutional insofar as it granted the power to exercise eminent domain in aid of coal mining (Tr. 4). In so ruling, the Court noted that it was "reluctant to disagree with the New Mexico trial judge interpretating New Mexico law."

Petitioner moved for rehearing and also moved to stay proceedings pending a determination of the controlling issue of state law in a declaratory judgment action it had filed in the State Court on the same day, and which is now pending in the State Court (Tr. 6; Supp. Tr. 1). Both Motions were denied on February 1, 1968, Judge Brown dissenting from denial of the Motion to Stay (Tr. 11, 12).

REASONS FOR GRANTING THE WRIT

POINT I

The Court of Appeals Has Decided a Vital State Constitutional Issue in a Manner Which Is or Maybe in Conflict with Applicable State Law.

If the question of state law decided by the Court of Appeals were a proper one for decision by a Federal Court, sufficient authority and reason exist to warrant review and reversal of that Court's decision on the merits. However, the question of state law, apart from being difficult, is also of major importance to New Mexico, and this case presents not only the issue of whether the Court of Appeals decided the state question correctly, but the more fundamental issue of whether it should have decided the state question at all. For that reason, Petitioner foregoes a review on the merits and urges this Court to review and reverse the Court of Appeals' order refusing to stay proceedings.

In order to demonstrate the necessity of abstention, some discussion of the state-law issue is required, if only to show its difficulty and its importance to the state. Petitioner and the District Judge construe New Mexico law as declaring a public use in the distribution of the state's waters for application to a beneficial use, and providing that if the use is in fact beneficial, the power of eminent domain can be exercised by private parties for distribution of the waters from the point of diversion to the point of application. The New Mexico Constitution establishes public ownership of all unappropriated waters, "subject to appropriation for beneficial use," N. M. Const., Art. XVI, Sec. 2, and makes "beneficial use" the basis, measure and limit of the right to use water. Art. XVI, Sec. 3. Application to a beneficial use is essential to a completed appropriation of water. *State ex rel. State Engineer* v. *Crider*, 78 N.M. 312, 431 P.2d 45 (1967). New Mexico, like other arid Western States, thus rejected the riparian theory of water ownership, as economic conditions did not permit exclusive dominion over water dependent solely upon geographic location adjacent to a stream. See *Albuquerque Land & Irrig. Co.* v. *Gutierrez*, 10 N.M. 177, 61 Pac. 357 (1900), *aff'd* 188 U.S. 545 (1903); *Lindsey* v. *McClure*, 136 F.2d 65 (10th Cir. 1943).

Appropriation, the basis of New Mexico's water law, consists first of diverting the water from a natural stream; second, transporting it to the point of use; and, ultimately, applying it to the particular beneficial use. The right to *transport* the waters is crucial, for otherwise there can be no assurance that the public waters will be used except for uses on lands lying adjacent to the point of diversion, thereby permitting owners of vast acreages of land, of which there are many in the State, to monopolize the public water and effectively restrict development of the State's resources and industries in the greater areas of the State which do not adjoin a live stream system.

In order to guarantee that the public waters can be used by other than riparian owners, the Territorial Legislature in 1907 enacted Section 75-1-3, giving any person, firm or corporation the right of eminent domain for the construction, maintenance, and operation of pipelines and other works for the "conveyance of water for beneficial uses." The necessity for such a grant of the eminent domain power has been recognized by the State Court in *Threlkeld* v. *Third Judicial Dist. Ct.*, 36 N.M. 350, 355, 15 P.2d 671, 673 (1932).

> ". . . we . . . [have] a policy, . . . time-honored, as to waters. We had nationalized them. Not as a source of public revenue, as minerals are retained for royalties; but as an elemental necessity, like air, which must not be allowed to fall under private control. Only by invoking the power of eminent domain can the state distribute its own water as its public policy requires. A right of way taken for that purpose is in a large sense devoted to the public use. This policy finds general and express recognition in the Constitution. It is impossible to suppose that any interpretation of 'public use' was intended to upset it."

While no case involving mining has arisen under Section 75-1-3, distribution of water for application to a beneficial use has repeatedly been held a public use. See *Albuquerque Land & Irrig. Co.* v. *Gutierrez*, 10 N.M. 177, 61 Pac. 357 (1900), *aff'd* 188 U.S. 545 (1903); *City of Albuquerque* v. *Garcia*, 17 N.M. 445, 130 Pac. 118 (1913); *Pueblo of Isleta* v. *Tondre*, 18 N.M. 388, 137 Pac. 86 (1913); *Young* v. *Dugger*, 23 N.M. 613, 170 Pac. 61 (1918); *State ex rel. Red River Valley Co.* v. *District Court*, 39 N.M. 523, 51 P.2d 239 (1935). Section 75-1-3 has been upheld as authorizing a private party to condemn for the purpose of irrigation, the only "ultimate

use" heretofore considered under the statute. *Young* v. *Dugger, supra.*

Against this background, the Court of Appeals concluded that the power to condemn must be measured only by "ultimate use." Dismissing the prior State Court construction of Section 75-1-3 as dealing solely with the ultimate use of irrigation, the Court found its answer in *Gallup American Coal Co. v. Gallup Southwestern Coal Co.*, 39 N.M. 344, 47 P.2d 414 (1935), a case having nothing to do with New Mexico water law, but one in which the business of coal mining was held not to be affected with a public use sufficient to justify upholding of a statute giving coal companies general powers of condemnation. The Court concluded that Section 75-1-3, therefore, violated the New Mexico Constitution if applied in aid of coal mining. This decision implies some special status for farmers, or some distinction between irrigation, mining, and other beneficial uses of water, all of which are conspicuously absent from New Mexico law. The Court of Appeals also overlooked a legislative declaration in N.M.S.A., Sec. 68-2-1 (1953), that the *supplying* of water for mining was a public use and a judicial confirmation of that declaration in *Albuquerque Land & Irrig. Co.* v. *Gutierrez, supra,* which held that lands condemned for the purposes specified in Section 68-2-1 are for a public purpose.

The divergence between the opinions of the District Court and the Court of Appeals, while perhaps explainable in light of the above statutes and decisions, points up the difficulty of the question, which was acknowledged by the Court of Appeals:

> "It is conceded that this precise question . . . has never been presented to the New Mexico Courts. * * * The case law is not decisive. . . ."

(Opinion, Tr. 4, p. 5). Even transcending the difficulty of the state-law question, however, is its importance to the State. As the Court of Appeals admitted:

> ". . . the decision in this case must have a far-reaching effect. . . . [I]f the 'beneficial use' is to be determined by the *ultimate use* to which the water is put, then even though an individual or industry may secure a valid right to take water from the public sources, there can be no assurance of any means of diverting the water from its source to the place of use, and industry and growth of the State could be severely hampered."

(Opinion, Tr. 4, p. 5). See also, dissenting opinion, Tr. 11, pp. 13-14:

> ". . . the real peril of this decision is that the victim is in no real sense either party to the cause. The one suffering is the state and its carefully nurtured, domestically contrived public policy."

The obvious importance of the question to the State is revealed by its Motion for leave to appear as Amicus Curiae in the Court of Appeals prior to consideration of the Motions for rehearing and to stay proceedings (Tr. 8; See also, dissenting opinion, Tr. 11, p. 14, n. 17) and by its Amicus Curiae Brief filed in this Court. The appearance of the State's highest law officer is strongly indicative, if not determinative, of the great public importance of this question to the State. See *Burford* v. *Sun Oil Co.*, 319 U.S. 315, 324 (1943).

The Court of Appeals' decision is an intrusion upon the State's policies in at least three areas of sovereign prerogative: (1) Conservation and development of an extremely important natural resource; (2) Delegation of the power of eminent domain; and (3) Promotion and protection of economic development. The decision is probably in conflict with what the State Court would decide,

and calls for review by this Court to prevent an unnecessary disruption of state policy by the Federal Court.

POINT II

The Decision of the Court of Appeals Is in Conflict with Applicable Decisions of This Court.

The Court of Appeals' refusal to stay proceedings is in direct conflict with *Louisiana Power & Light Co.* v. *City of Thibodaux*, 360 U.S. 25 (1959), where, as here, a Federal Court was asked to determine the validity of a state grant of the power of eminent domain. As in this case, the state issue was difficult, and few guidelines were provided for the Court's decision. This Court held that "exceptional circumstances" existed calling for abstention, noting that:

> "The fundamental fact is that eminent domain is a prerogative of the state, which, on the one hand, may be exercised in any way that the state sees fit, and on the other, may not be exercised except by an authority which the state confers.
>
> * * *
>
> "The issues normally turn on legislation with much local variation interpreted in local settings. The considerations that prevailed in conventional equity suits for avoiding the hazards of serious disruption by federal courts of state government or needless friction between state and federal authorities are similarly appropriate in a state eminent domain proceeding brought in, or removed to, a federal court."

Apart from being a delegation of the State's power of eminent domain, Section 75-1-3 is also, in the words of the New Mexico Supreme Court, part of a "comprehensive code of laws in 73 sections for the conservation, development, and beneficial use of the public waters of the state. . . ." *State ex rel. Red River Valley Co.* v. *District Ct. of 4th Judicial Dist.*, *supra*, 39 N.M. at 526, 51 P.2d at

240. The Court of Appeals' refusal to stay proceedings, is, therefore, in conflict with several decisions of this Court which have recognized that the possible conflict between a federal decision and state policies developed pursuant to such a unified scheme of resource development is in itself an "exceptional circumstance" calling for abstention. *Railroad Comm'n of Texas* v. *Pullman Co.*, 312 U.S. 496 (1941); *Burford* v. *Sun Oil Co.*, 319 U.S. 315 (1943); *Alabama Pub. Serv. Comm'n* v. *Southern Ry.*, 341 U.S. 341 (1951). In *Burford*, abstention was upheld in a suit by oil companies seeking to enjoin an Order of the Texas Railroad Commission, this Court noting:

> "The order under consideration is part of the general regulatory system devised for the conservation of oil and gas in Texas. . . .
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> * * *
>
> "Texas interests in this matter are more than that very large one of conserving gas and oil, two of our most important natural resources. It must also weigh the impact of the industry on the whole economy of the state. . . ."
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> * * *
>
> These questions of regulation of the industry by the state administrative agency . . . so clearly involves basic problems of Texas policy that equitable discretion should be exercised to give the Texas courts the first opportunity to consider them. . . ." 319 U.S. at 318, 320, 332.

The above decisions of this Court, recognizing delegation of the power of eminent domain and unified state schemes for development of resources as "exceptional circumstances" calling for abstention, imply the importance of those areas of sovereign prerogative in the economic growth of the Western States. This relation of water law and the power of eminent domain to economic develop-

ment was long ago recognized by Congress in the Act of July 26, 1866, 14 Stat. 253, 43 U.S.C., Sec. 661 (1958), which recognized and confirmed priority rights on the public domain to appropriation and use of water for mining as well as agricultural, manufacturing, and other uses, to the extent such rights were recognized under local law. That statute also recognized the importance of transportation of waters for such purposes:

> ". . . the right-of-way for the construction of ditches and canals for the purposes herein specified is acknowledged and confirmed; but whenever any person, in the construction of any ditch or canal, injures or damages the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage."

This Act was intended to protect existing industries and to promote industrial development in the Western States, *United States* v. *Hunter*, 236 F. Supp. 178, 181 (S.D. Cal. 1964), and recognized, so far as the United States is concerned, the validity of local customs, laws and decisions respecting the appropriation of water, *United States* v. *Rio Grande Dam & Irrig. Co.*, 174 U.S. 704 (1899). The refusal of the Court of Appeals to stay proceedings, in a case directly and adversely affecting the state's water law, eminent domain law and economic development, conflicts with the recognition of the prerogative of the states in these areas implicit in this Court's prior decisions and inherent in the Act of July 26, 1866.

Even apart from the direct conflict with prior decisions of this Court and with the specific underlying principles of those decisions, the refusal to stay proceedings conflicts in principle with prior decisions of this Court delineating the purpose of the abstention doctrine itself. The rationale of the doctrine is that a federal court should not decide

difficult and unsettled questions of state law in a manner which might conflict with important policies of the state, and that recognition of the final authority of the state court to pass upon the question and the need for harmonious relations between the state and federal systems justifies abstention or a stay of proceedings to allow for determination of the controlling issue by the state court. *Railroad Comm'n of Texas* v. *Pullman Co., supra,* 312 U.S. at 500-01.

> "Few public interests have a higher claim upon the discretion of a federal chancellor than the avoidance of needless friction with state policies. * * * These cases reflect a doctrine of abstention appropriate to our federal system whereby the federal courts, 'exercising a wise discretion,' restrain their authority because of 'scrupulous regard' for the rightful independence of the state governments' and for the smooth working of the federal judiciary. * * * This use of equitable powers is a contribution of the courts in furthering the harmonious relation between state and federal authority without the need of rigorous congressional restriction of those powers."

The Court of Appeals' decision on the merits will obviously have a severe effect upon economic development in New Mexico, and is tantamount to an attempt to formulate the state's policies in that area as well as the areas of water law and eminent domain. This case fits within the basic purpose of the abstention doctrine as defined by *Pullman* and subsequent decisions of this Court, and the Court of Appeals' refusal to stay proceedings conflicts in principle with those decisions.

The principles of the abstention doctrine would also seem to dictate recognition of the state's special concern in construing its statutes under its own constitution. Although not specifically passed upon by this Court as a

ground for abstention, lower federal courts have recognized that they should be particularly hesitant to strike down a statute as unconstitutional under the *state* constitution. *Miller* v. *City of Greenville*, 138 F.2d 712, 718-19 (8th Cir. 1943); *Sherwood* v. *Bradford*, 246 F. Supp. 550, 552 (S.D. Cal. 1965); *B-W Acceptance Corp.* v. *Torgerson*, 234 F. Supp. 214 (D. Mont. 1964).

In addition to the direct conflicts and conflicts in principle with prior decisions of this Court, there is nothing in any of this Court's prior decisions justifying refusal to abstain. Abstention cannot be denied on the basis that this is a diversity case, for although abstention is most often applied to avoid striking down an ambiguous state statute where jurisdiction is based upon a federal constitutional question, *Zwickler* v. *Koota*, 389 U.S. 241 (1967), it is applicable, and there is perhaps even more reason for applying it, in a diversity case involving unsettled issues of state law plus "exceptional circumstances." See *Louisiana Power & Light Co.* v. *City of Thibodaux*, 360 U.S. 25 (1959). In a diversity case, if abstention is refused and an unsettled issue of state law is decided, the parties have no right to appeal that decision to the court having the final word on the issue, as exists when abstention is granted in a federal question case, *England* v. *Louisiana State Bd. of Med. Exam.*, 375 U.S. 411 (1964). See *United Serv. Life Ins. Co.* v. *Delaney*, 328 F.2d 483, 487 (5th Cir. 1964) (concurring opinion, Brown, J.), *cert. denied* sub nom. 377 U.S. 935 (1964). See also dissenting opinion herein, Tr. 11, pp. 6-9. No justification for the refusal to stay proceedings is found in the fact that the decision is binding only upon the parties, and can be upset by a later authoritative determination of the state court, for such an argument ignores the admitted effect the decision must have upon administration of the state's water policies and upon decisions by private individu-

als who might be planning to establish sorely needed new industry in the state. See opinion, Tr. 4, p. 5; see also Note, *Abstention and Certification in Diversity Suits: "Perfection of Means and Confusion of Goals,"* 73 Yale L. J. 850, 863 (1964).

As the State Court has never spoken on the issue and "exceptional circumstances" heretofore defined by this Court are present, *Meredith* v. *Winter Haven*, 320 U.S. 228 (1943) does not justify the lower decision; nor does *County of Allegheny* v. *Frank Mashuda Co.*, 360 U.S. 185 (1959), as this case does not present the resolution of a fact issue against the background of settled state law. In addition, prior decisions of this Court in no way justify a denial of abstention because of the fact that the Tenth Circuit was asked to abstain after its adverse decision on the merits. Petitioner, in connection with its motion to dismiss in the District Court, requested the District Judge to abstain if he had any doubts whatsoever regarding Petitioner's power to condemn (Supp. Tr. 1, Exhibit B to Motion to Stay Proceedings; dissenting opinion, Tr. 12, p. 15, n. 18). As Judge Brown noted in his dissenting opinion:

> ". . . the fact that the motion is now made after the adverse decision of this Court, while a powerful circumstance in many situations, does not prevent the exercise of abstention now in view of these great public stakes."

Tr. 11, pp. 14-15. In fact, abstention has often been applied for the first time in this Court, and in the Courts of Appeals, after an adverse decision on the merits. See, *e.g.*, *United Gas Pipe Line Co.* v. *Ideal Cement Co.*, 369 U.S. 134 (1962); *Leiter Minerals, Inc.* v. *United States*, 352 U.S. 220 (1957); *Green* v. *Phillips Petroleum Co.*, 119 F.2d 466 (8th Cir. 1941), *cert. denied* 314 U.S. 637 (1941); *United Serv. Life Ins. Co.* v. *Delaney*, *supra*.

Because of the important concepts of federalism embodied in the doctrine of abstention, however, any delay in presenting the doctrine should not affect its availability here. Questions of grave significance to the State of New Mexico, and profoundly affecting its policy, have been decided. The conflict between the federal and state systems, and the conflict between the decision below and prior decisions of this Court, is in no way lessened by a holding that delay in presenting the doctrine precludes its use.

POINT III

The Decision of the Court of Appeals Is in Conflict, at Least in Principle, with Decisions of Other Courts of Appeals on the Same Matter.

The Tenth Circuit, along with several other Circuits, has lost sight of the salutary reasons behind the creation of the abstention doctrine so clearly pointed out by this Court in *Railroad Comm'n of Texas* v. *Pullman Co.*, 312 U.S. 496 (1941).

These Circuits instead have limited the application of the doctrine to the fact situations previously decided by this Court and have held that abstention is confined to cases involving federal constitutional questions, specific disruption of state administrative processes, interference with the collection of state taxes, or injunctions against state officials. See *Martin* v. *State Farm Mut. Auto. Ins. Co.*, 375 F.2d 720 (4th Cir. 1967); *Liberty Mut. Ins. Co.* v. *Pennsylvania R.R.*, 322 F.2d 963 (7th Cir. 1963). Abstention has been refused in cases involving state regulation of the practice of medicine or chiropracty, *United States* v. *Shock*, 379 F.2d 29 (8th Cir. 1967); construction of state laws governing horse racing, *Amsley* v. *West Virginia Racing Comm'n*, 378 F.2d 815 (4th Cir. 1967); and interpretation of state chattel mortgage statutes in a bankruptcy pro-

ceeding, *In re Mohammed*, 327 F.2d 616 (6th Cir. 1964), *Cf. Thompson* v. *Magnolia Petroleum Co.*, 309 U.S. 478 (1940).

On the other hand, other Circuits have had little difficulty in extending the doctrine beyond prior fact situations decided by the United States Supreme Court. *United Serv. Life Ins. Co.* v. *Delaney, supra* (interpretation of an insurance policy under state law); *Tomiyasu* v. *Golden*, 358 F.2d 651 (9th Cir. 1966) (attack upon a State Court Judgment). The difference in philosophy and principle, at least, between these Circuits is thus readily apparent, as is the conflict between the decision in this case and the principles expressed in *Delaney, supra.* See Dissenting Opinion of Judge Brown, Tr. 11, pp. 6-9, 15-17.

In addition, there is a direct and irreconcilable conflict between the Fourth and Fifth Circuits as to the scope of the abstention doctrine in a diversity case involving the construction of an insurance policy under unsettled state law. Compare *Martin* v. *State Farm Mut. Auto. Ins. Co., supra,* with *United Serv. Life Ins. Co.* v. *Delaney, supra.* This conflict continues to develop, and the Court of Appeals' refusal to abstain, if allowed to stand, will contribute to a wider divergence of opinion.

POINT IV

The Tenth Circuit Has Decided an Important Question of Federal Law Which Has Not Been, But Should Be, Settled by This Court.

As stated in Point III, *supra,* a conflict exists on the subject of abstention in diversity cases among the Circuits. Furthermore, there would even appear to be a conflict in principle between the decisions of this Court. In *Thompson* v. *Magnolia Petroleum Co.*, 309 U.S. 478 (1940), the

Court abstained from deciding a difficult and unsettled question as to the proper interpretation of a conveyancing instrument under state law, whereas in *Meredith* v. *Winter Haven*, *supra*, it was held that abstention was not justified simply because the state-law question was difficult and unsettled. See *Louisiana Power & Light Co.* v. *City of Thibodaux*, *supra*, 360 U.S. at 27.

Commentators and Courts alike express confusion regarding application of the doctrine in diversity cases, primarily centering about discussion of the effect of *Thibodaux* upon *Meredith*. See *e.g.*, Note, *Abstention and Certification, etc.*, *supra*, 73 Yale L. J. at 853; Note, *Federal Question Abstention: Justice Frankfurter's Doctrine in an Activist Era*, 80 Harv. L. R. 604, 622 (1967); *MachTronics, Inc.* v. *Zirpoli*, 316 F.2d 820 (9th Cir. 1963); *White* v. *Husky Oil Co.*, 266 F. Supp. 239, 241 (D. Mont. 1967); *Schenley Industries, Inc.* v. *New Jersey Wine & Spirit Wholesale Ass'n*, 272 F. Supp. 872 (D. N.J. 1967). A listing of all the decisions, law review articles and texts which have puzzled over the scope of the abstention doctrine in diversity cases would serve no useful purpose, the commentators being mainly in agreement that the law is unsettled in this area and a further expression would be of great aid in the administration of justice in the Federal Courts.

The abstention doctrine and its guidelines have perhaps been better understood by the Courts in cases where federal jurisdiction is founded upon a federal question than when it is based upon the geographical accident of diversity of citizenship. In *Zwickler* v. *Koota*, 389 U.S. 241 (1967), this Court took the opportunity to restate and clarify the rules governing the application of the doctrine in federal constitutional cases. Yet the guidelines for the

application of abstention in diversity cases are more obscure and less understood than were the principles to be applied in a case arising under the federal constitution prior to *Zwickler, supra.* Even beyond the importance of review of this case to the parties and the State of New Mexico, the increased volume of litigation in the Federal Courts and the recurring frequency with which the doctrine of abstention is raised make it paramount that the Court speak.

POINT V

The Importance of the Question, and the Departure in the Decision Below from Accepted and Usual Principles Governing the Resolution of Controversies in Our Federal System, Call for an Exercise of This Court's Power of Supervision.

The decision of the Tenth Circuit struck down a state statute which had previously been upheld by the highest court of the state in cases involving other beneficial uses of water and which had rested undisturbed as part of a well-considered and important local policy for 61 years. Such an intrusion into the sovereign policy of New Mexico concerning its public waters, economic development and delegation of the power of eminent domain, in a case where the Court recognized that the "case law is not decisive" and that it was prognosticating, is far beyond the purpose and intent of diversity jurisdiction.

Recognition and preservation of the principles of federalism upon which this country was founded is at least as important as guarding the exercise of diversity jurisdiction by the District Courts. Indeed, the historic reason for diversity jurisdiction, to protect the foreign litigant from unfair or biased treatment in the State Courts, *Burford* v. *Sun Oil Co., supra,* 319 U.S. at 336 (Frank-

furter, J., dissenting opinion) does not apply here as Petitioner, the Defendant below and the party now trying to get into the state court, is the foreign corporation.

The abstention doctrine has a necessary function in avoiding unnecessary and undesirable conflicts between State and Federal Governments, and thus preserving the delicate balance of federal-state relations inherent in our concept of federalism. The decision of the Court of Appeals is so far a departure from the recognized principles governing exercise of the doctrine that the Court's supervisory power should be invoked. The abstention doctrine is, after all, a "judge-made doctrine," *Zwickler* v. *Koota, supra,* 389 U.S. at 248, and this Court is the only place to which Petitioner, the State of New Mexico or the Federal District and Circuit Courts might look for its clarification.

Petitioner recognizes that this Court's supervisory power is a restricted and discreetly employed tool, but submits that a decision by a Federal Court in conflict with the well-reasoned purpose behind the abstention doctrine and the decisions of *Burford* v. *Sun Oil Co., supra,* and *Louisiana Power & Light Co.* v. *Thibodaux, supra,* and which could strike a serious blow to the economic development of a sovereign state, calls for the exercise of that power. This surely is a case where "scrupulous regard for the rightful independence of state governments and for the smooth working of the federal judiciary" counsels application of the abstention doctrine pending resolution of the controlling state issue by the State Courts.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

.....

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APPENDIX A

New Mexico Constitution, Art. II, Sec. 20:

> Private property shall not be taken or damaged for public use without just compensation.

New Mexico Constitution, Art. XVI, Sec. 1:

> All existing rights to the use of any waters in this state for any useful or beneficial purpose are hereby recognized and confirmed.

New Mexico Constitution, Art. XVI, Sec. 2:

> The unappropriated water of every natural stream, perennial or torrential, within the state of New Mexico, is hereby declared to belong to the public and to be subject to appropriation for beneficial use, in accordance with the laws of the state. Priority of appropriation shall give the better right.

New Mexico Constitution, Art. XVI, Sec. 3:

> Beneficial use shall be the basis, the measure and the limit of the right to the use of water.

New Mexico Statutes Annotated (1953 Comp.), Sec. 75-1-3:

> The United States, the state of New Mexico, or any person, firm, association or corporation, may exercise the right of eminent domain, to take and acquire land right of way for the construction, maintenance and operation of reservoirs, canals, ditches, flumes, aqueducts, pipelines or other works for the storage or conveyance of water for beneficial uses, including the right to enlarge existing structures, and to use the same in common with the former owner; any such right of way for canal, ditch, pipeline, or other means for the conveyance of water shall in all cases be so located as to do the least damage to private or public property

consistent with proper use and economical construction. Such land and right of way shall be acquired in the manner provided by law for the condemnation and taking of private property in the state of New Mexico for railroad, telegraph, telephone and other public uses and purposes. The engineers and surveyors of the United States, the state and of any person, firm or corporation shall have the right to enter upon the lands and waters of the state and of private persons and of private and public corporations, for the purpose of making hydrographic surveys and examinations and surveys necessary for selecting and locating suitable sites and routes for reservoirs, canals, pipelines and other water works, subject to responsibility for any damage done to such property in making such surveys.

New Mexico Statutes Annotated (1953 Comp.), Sec. 68-2-1:

Any five [5] persons who may desire to form a company for the purpose of constructing and maintaining reservoirs and canals, or ditches and pipelines, for the purpose of supplying water for the purpose of irrigation, mining, manufacturing, domestic and other public uses, including cities and towns, and for the purpose of colonization and the improvement of lands in connection therewith, for either or both of said objects, either jointly or separately, shall make and sign articles of incorporation, which shall be acknowledged before the secretary of state, or some person authorized by law to take the acknowledgment of conveyances of real estate, and when so acknowledged, such articles shall be filed with the state corporation commission.

New Mexico Statutes Annotated (1967 Supp.), Sec. 22-9-22:

The state of New Mexico or any agency or political subdivision thereof, including the state highway commission and any person, firm or corporation authorized by the Constitution or laws of this state to

exercise the right of eminent domain who has heretofore taken or damaged or who may hereafter take or damage any private property for public use without making just compensation therefor or without instituting and prosecuting to final judgment in a court of competent jurisdiction any proceeding for condemnation thereof, shall be liable to the owner of such property, or any subsequent grantee thereof, for the value thereof or the damage thereto at the time such property is or was taken or damaged, with legal interest, to the date such just compensation shall be made, in an action to be brought under and governed by the Code of Civil Procedure of this state. Actions under this section shall be brought in the county where the land or any portion thereof is located.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

W. S. RANCH COMPANY, a New Mexico Corporation,
Plaintiff,
vs.
KAISER STEEL CORPORATION, a Nevada Corporation,
Defendant.

No. 6658. Civil

Memorandum Opinion

Defendant operates a coal mine in Colfax County, New Mexico and owns a water right in the Vermejo river which flows through plaintiff's ranch lands in the same county. Defendant has constructed on lands owned by plaintiff, but entirely on lands over which the Atchison, Topeka & Santa Fe Railway Company has an easement for operation of a railroad to defendant's mine, a water line together with two wells and a sump on the bank of the river. The railroad company has raised no objection to the water line and wells and at least tacitly has approved of such use of its right of way. Not so the plaintiff, who brings this action for an injunction and seeks ten thousand dollars compensatory damages and a million dollars punitive damages.

Defendant has filed a Motion to dismiss, contending plaintiff's sole remedy is an action to assess damages under the provisions of the New Mexico Inverse Condemnation Statute, Section 22-9-22, N.M.S.A. 1953 Comp. The Motion to dismiss must be sustained if the defendant is given the right of eminent domain. *Garver and Hillmeyer* v. *Public Service Company of New Mexico*, S.Ct. N.M., #7939, ... N.M. ....., Vol. 5 No. 25 Advance Opinions, December 15, 1966.

The defendant claims the right of eminent domain by reason of Sec. 75-1-3, N.M.S.A. 1953 Comp., which provides in relevant part as follows:

> "* * any person, firm, * or corporation, may exercise the right of eminent domain, to take and acquire land right-of-way for the construction, maintenance and operation of reservoirs, canals, ditches, flumes, aqueducts, pipe-lines or other works for the storage or conveyance of water for beneficial uses, * * * any such right-of-way for canal, ditch, pipeline, or other means for the conveyance of water shall in all cases be so located as to do the least damage to private or public property consistent with proper use and economical construction."

The plaintiff contends that this statute,

(1) has no application to the defendant under the facts of this case; or

(2) that insofar as it may be applicable to one in defendant's position, it is contrary to the provision of Article II, Section 20 of the New Mexico Constitution which provides:

> "Private property shall not be taken or damaged for public use without just compensation."

One preliminary question is whether that part of Section 75-1-3, supra, which authorizes condemnation of land for facilities "for the storage or conveyance of water" permits the installation of wells, sump and pumps or similar diversion systems.

In *Pueblo of Isleta* v. *Tondre and Pickard*, 18 N.M. 388; 137 Pac. 86, the Court permitted the exercise of eminent domain for "a new head-gate, together with a considerable length of ditch from the new point of diversion, * * *". The case was before the Court on another issue, and the ques-

tion of the head-gate being within the ambit of the statute was not discussed. In *Snow* v. *Abalos*, 18 N.M. 681, 140 Pac. 1044, the Court quotes with approval Kinney on Irrigation and Water Rights, (2d ed.) Sec. 707, as follows:

> " 'The appropriation of water consists in the taking or diversion of it from some natural stream * * and consummated * * by the actual application of * * the water to the use designed or to some other useful purpose.' "

The Court goes on to state:

> "Necessarily he must have some suitable ditch, or other device, to enable him to take the water from the stream. In other words, the water must be captured before it can be applied to a beneficial use."

This statute, 71-5-3, supra, is to be given a liberal construction. *State* v. *District Court*, 39 N.M. 523, 51 Pac. 2d 239. A statute must be so construed as not to defeat its purpose. *Fisherdick* v. *Board of Education*, 30 N.M. 454, 236 Pac. 743. The right to a reasonable diversion from a flowing stream would be included in the grant of the right for the storage or conveyance of water for beneficial uses. A more limited construction would defeat the purpose of the statute.

In contending that the statute is contrary to the New Mexico Constitution as applied to the facts of this case, the plaintiff cites *Threlkeld* v. *Third Judicial District Court*, 36 N.M. 350, 15 Pac. 2d 671, and *Gallup American Coal Co.* v. *Gallup Southwestern Coal Co.*, 39 N.M. 344, 47 Pac. 2d 414. In *Threlkeld* the New Mexico Supreme Court declared unconstitutional a New Mexico Statute (now appearing as Sections 22-9-20 and 21, N.M.S.A. 1953 Comp.) purporting to give logging companies the right of eminent domain. The Court held that the power of eminent domain could not be granted to private lumbering interests to enable them

to get their own logs to market. In a similar vein was the holding in the *Gallup American* case, as applied to a coal mining company.

The defendant herein is likewise a coal company but we are here concerned with a different statute. The statute here involved, 75-1-3, supra, in effect declares the beneficial use of water to be a public use, and it has been so interpreted by the New Mexico Supreme Court. *Pueblo of Isleta* v. *Tondre,* supra, *Young* v. *Dugger,* 23 N.M. 613, 170 Pac. 61; *City of Albuquerque* v. *Garcia, et al.,* 17 N.M. 445, 130 Pac. 118. Plaintiff points out that in all these cases the ultimate use of the water was for irrigation or domestic purposes. But the statute places no such limit on the use of the water nor have the courts.

The New Mexico cases are replete with the observation that New Mexico is an arid state. It is in the public interest that the waters of the state, which are public, be applied to a beneficial use. The expressed policy of the New Mexico Legislature is that such application is a public use. That policy is not in violation of the New Mexico Constitution.

Prior to statehood the Territorial Supreme Court considered the statute authorizing companies for the purpose of constructing irrigation and other canals and granting to such companies the right of eminent domain. *Land and Irrigation Co.* v. *Gutierrez,* 10 N.M. 177, 61 Pac. 357.

The statute provided that the purposes for which such companies might be formed would include:

> "* * * the purpose of constructing and maintaining reservoirs and canals, or ditches and pipe lines, for the purpose of irrigation, mining, manufacturing, domestic and other public uses, including cities and towns, and for the purpose of colonization and improvement of lands, in connection therewith;"

The Court held in part:

> "That lands condemned and used for the right of way of reservoirs, canals, ditches and pipe lines, for the purposes specified in the act above referred to, are for a public purpose, is too plain to require extended discussion."

In *Threlkeld* v. *Third Judicial District Court*, supra, the Court pointed out the difference between granting the power of eminent domain to a particular industry and granting it for the purpose of distributing the public waters of the state for beneficial use. It was said:

> "Nevertheless, we may indorse all that was said in Nash v. Clark, supra, regarding irrigation as a public use, without accepting the view of the majority in that case that 'enlightened public policy' is better represented by the 'line of decisions' which would impair the constitutional guaranty by accepting as a 'public use' anything thought to promote the public interest. We think that by incorporating in our Constitution the time-honored formula for the protection of private property, we adopted its generally recognized meaning.
>
> "However, we already had a policy, also time-honored, as to waters. We had nationalized them. Not as a source of public revenue, as minerals are retained for royalties; but as an elemental necessity, like air, which must not be allowed to fall under private control. Only by invoking the power of eminent domain can the state distribute its own waters as its public policy requires. A right of way taken for that purpose is in a large sense devoted to public use. This policy finds general and express recognition in the Constitution. It is impossible to suppose that any interpretation of 'public use' was intended to upset it."

It is the position of plaintiff that the particular ultimate use of the waters is determinative of whether or not

a public use is involved. This is not so. It is the distribution of the public waters of the State of New Mexico to a beneficial use which is the public purpose.

While the grant of eminent domain may be exercised either by the State, *State ex rel. Red River Valley Co.* v. *District Court*, 39 N.M. 523, 51 Pac. 2d 239, or by private persons and industry, *Young* v. *Dugger*, supra, the public use which is being furthered is the distribution of the public waters of the state without which an arid state cannot develop.

The Motion to dismiss is sustained.

This Memorandum Opinion will be filed as the Court's Conclusions of Law.

/s/ Howard Bratton
United States District Judge

United States Court of Appeals

TENTH CIRCUIT
SEPTEMBER 1967 TERM

W. S. RANCH COMPANY, a New Mexico Corporation,
Appellant,
vs.
KAISER STEEL CORPORATION, a Nevada Corporation,
Appellee.

No. 9295

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO

A. K. Montgomery and Seth D. Montgomery (George W. Robertson, G. Gordon Robertson and Richard S. Morris with them on brief) for Appellant.

Paul A. Kastler and George T. Harris, Jr. for Appellee.

Before MURRAH, Chief Judge, BROWN* and HICKEY, Circuit Judges.

MURRAH, Chief Judge

This is an appeal from judgment of dismissal for failure to state a claim on which relief can be granted. The two-fold question, presented and decided on the pleadings, is whether the New Mexico statutes grant the right of eminent domain to a private corporation for the purpose of securing water to be used in coal mining operations, and, if so, whether inverse condemnation proceed-

*By Special Designation.

ings is the sole remedy available to one whose land is so taken.

Plaintiff-appellant W. S. Ranch Company filed its Complaint in the District Court of New Mexico alleging that it is the owner and possessor of certain land on and near the Vermejo River in New Mexico; that defendant-appellee Kaiser Steel Corporation wilfully and maliciously entered upon Ranch's lands, after notice that its right to enter was disputed, drilled diversion wells and laid a pipeline to divert water from the Vermejo River to its coal mining operations adjacent to Ranch's property; and that Ranch is entitled to an injunction against further trespass and compensatory and punitive damages. Claiming the right of eminent domain, Kaiser responded with a Motion to Dismiss the Complaint supported by an affidavit to the effect that Kaiser owns water rights approved by the New Mexico State Engineer to be used for "beneficial use" at its coal mine; that an approved place of diversion for such waters is on the Vermejo River and that the beneficial use of such waters necessitates conveying them by pipeline across Ranch's lands. Nowhere does Kaiser contend that it negotiated with Ranch for a right-of-way or that it instituted condemnation proceedings as prescribed by Sec. 22-9-1 through 22-9-21 N.M. Stat. Anno.

Kaiser claims its right to eminent domain under the following constitutional and statutory provisions:

Art. XVI, §2 N.M. Const.

> "The unappropriated water of every natural stream, perennial or torrential within the state of New Mexico is declared to belong to the public and to be subject to appropriation for beneficial use in accordance with the laws of the state. Priority of appropriation shall give the better right."

Art. XVI, §3 N.M. Const.

"Beneficial use shall be the basis, the measure and the limit of the right to use water."

§75-1-3, N.M. Stat. Anno., 1963 Comp.

"* * * any person, firm * * * or corporation, may exercise the right of eminent domain to take and acquire land right-of-way for the construction, maintenance and operation of * * * pipe lines or other works for the storage or conveyance of water for beneficial uses."

On Motion to Dismiss and here the Ranch Company argues that if, as Kaiser contends, §75-1-3 is construed to authorize the condemnation of private land to secure water in aid of mining operations, it must be declared unconstitutional as permitting the taking of private land for private use; that the statute can be accorded constitutional validity only if the "beneficial use" of water for which it authorizes eminent domain is determined by the ultimate or final use of the water, and that use inurs to the benefit of the public—not private industry. The effect of this argument is to suggest that even though the constitutional words "beneficial use" may be construed to mean any use whatsoever except waste, when that term involves the exercise of the power of eminent domain, it must necessarily be measured by "ultimate use" and limited to "public use".

Relying upon a number of New Mexico Supreme Court cases, Judge Bratton held that in an arid state such as New Mexico any "beneficial use" of water is a "public use", i.e. see Albuquerque Land and Irrigation Company v. Gutierrez, 61 Pac. 357; City of Albuquerque v. Garcia, 130 Pac. 118; Pueblo of Isleta v. Tondre, 137 Pac. 86; Young v. Dugger, 170 Pac. 61; State v. District Court of Fourth Judicial District, 51 P.2d 239; State v. Red River Valley Co., 182 P.2d 421; Threlkeld v. Third Judicial District Court,

15 P.2d 671. He agreed with Ranch that in each of the cited cases the New Mexico court was concerned only with the ultimate use of water for irrigation and other domestic purposes, concededly a "public purpose" in New Mexico. But, he thought it decisive that "the statute [75-1-3] places no such limit on the use of water, nor have the courts." He further reasoned that "While the grant of eminent domain may be exercised either by the State * * * or by private persons and industry * * * the public use which is being furthered is the *distribution* of the public waters of the state without which an arid state cannot develop"—not the *ultimate* use to which the water may be put after distribution. (Emphasis ours).

Undoubtedly, the decision in this case must necessarily have a far reaching effect. If the "beneficial use" of water is to be determined by the *distribution of water* among the people of New Mexico, as indeed the trial court held, then the "public benefit" must be rationalized in light of the well established fundamentals of eminent domain, for land will become subject to condemnation for purposes of diverting water to anyone whomsoever for any ultimate purpose whatsoever, public or private, save, of course, waste. On the other hand, if the "beneficial use" is to be determined by the *ultimate use* to which the water is put, then even though an individual or industry may secure a valid right to take water from the public sources, there can be no assurance of any means of diverting the water from its source to the place of use, and industry and growth of the state could be severely hampered. It is conceded that this precise question of industrial use of public waters has never been presented to the New Mexico courts. We must seek then to determine what that court will say when the question comes before it and to reconcile the law of eminent domain with

the peculiar body of water law developed from necessity in arid states.

Both Ranch and Kaiser rely upon the same New Mexico cases as did the trial court, each contending for a different interpretation. The case law is not decisive, but as we read the cases, the court in each instance scrutinized the specific or "ultimate" use to be made of the public water. An analysis of the crucial language in each case will illuminate our conclusion.

In 1900, prior to the enactment of 75-1-3, the New Mexico courts were already facing the question of condemnation of private land for purposes of diverting water from a public source to non-riparian lands. The court in Albuquerque Land and Irrigation Co. v. Gutierrez, supra, affirmed "that the legislature has power to enact a law granting the right of eminent domain * * * provided the property is for a *public purpose*" and "It is undoubtedly true that the diversion and distribution of water for *irrigation and other domestic purposes* in New Mexico and other western States where irrigation is necessary is a *public purpose.*" Id. 357 (Emphasis ours). Section 75-1-3 was enacted in 1907 and in 1913 the court first construed the statute stating, "The right *to condemn* lands *for irrigation ditches* was conferred upon 'the United States, the [State] of New Mexico, or any person, firm, association or corporation.'" See City of Albuquerque v. Garcia, supra. The court evidenced its concern for the constitutional question by citing and quoting the Utah case of Nash v. Clark, 75 Pac. 371, affd. 198 U.S. 361, to the effect that "In view of the physical and climatic conditions * * * and in light of the history of the arid West, which shows marvelous results accomplished by irrigation, to hold that the *use of water for irrigation* is not in any sense a public

use * * * would give to the term 'public use' altogether too strict an interpretation, and one we do not think is contemplated by the Constitution." (Emphasis ours)

Shortly thereafter in Pueblo of Isleta v. Tondre, supra, the New Mexico court held that the terms of 75-1-3 were broad enough to confer the right of condemnation for the *particular purpose of irrigation* upon persons holding valid water rights prior to enactment of the statute. The later case of Young v. Dugger, supra, presented again the sole question "whether the right of condemnation exists in favor of a private person *for the purpose* of conveying water for *irrigation purposes* over the land of another." Id. 61 (Emphasis ours). Relying on its previous decision in City of Albuquerque v. Garcia, supra, the court once more held that "use of water for irrigation purposes constitutes a public use."

In State v. District Court of Fourth Judicial District, supra, the State of New Mexico sought to condemn private land for the purpose of erecting a dam or reservoir for impounding the waters of the Canadian River. The court held that "The state may appropriate private property under its inherent power of eminent domain by legislative act * * *. Whether the *use to which the property is to be put* is a public use is a judicial question * * *. But the *character of use* here involved [irrigation] was long ago determined by the Supreme Court of the Territory to be a public use and never departed from by this court * * *".

Next came State v. Red River Valley Company, supra. The New Mexico court was concerned first with whether certain impounded waters were public waters and, if so, whether their use for recreational purposes would be a "beneficial use". The court noted that "The invitation to enjoy these recreational activities is urgently and con-

stantly extended by this and other states similarly situated, and millions of dollars are spent by tourists from less attractive areas who come to enjoy them." It went on to say that "We are asked to strike down the long-established rules pertaining to public water ownership and uses because we have not yet been called upon to apply it to this *particular beneficial use.* * * * We know of no reason why we should restrict the use of waters which belong to the public only to *the uses* which have *up to this time* been adjudicated by our Court as 'beneficial'." (Emphasis ours)

The water right cases were invoked in Threlkeld v. Third Judicial Dist. Court, 15 P.2d 671, 86 A.L.R. 547, in support of the asserted power of eminent domain under a statute authorizing a logging company to take private property for right-of-way purposes in accordance with the laws governing common carriers. Denying the right of eminent domain, the court went to the heart of the matter with the inquiry as to what ultimate use would be made of the right-of-way. Finding that the right-of-way was to be used in furtherance of logging operations, it concluded that such operations did not fit into the distinctive classification accorded uses of water for irrigation purposes, historically recognized as a public purpose out of "elemental necessity". Likening water to air which "must not be allowed to fall under private control", the court went on to use the language which Judge Bratton deemed significant and supportive to the effect that "Only by invoking the power of eminent domain can a state distribute its own waters as its public policy requires. A right-of-way taken for that purpose is in a large sense devoted to public use."

We are reluctant to disagree with a New Mexico trial judge interpreting New Mexico law, but nowhere in the cases examined can we find language to support the trial court's ruling that "the public use being furthered is the distribution of the waters * * *". On the contrary, our ap-

praisal of the language in each case leaves us with the inescapable impression that the court was looking to the ultimate use of the water to determine whether that use would inure to the benefit of the general public or only a few individuals. This is apparent in the Red River Valley case where the New Mexico court considered the general economic benefit to inure to the people of New Mexico from the particular use of its waters for recreational purposes. We think the language in that case leaves no doubt that the court deemed itself impelled to examine each proposed ultimate use of the public waters and determine whether that use was of sufficient public benefit as to justify eminent domain. This "ultimate use" concept is also manifest in the United States Supreme Court's affirmance of Nash v. Clark, supra, wherein it acknowledged that many factors have bearing upon "the question whether *the individual use* proposed might not in fact be a *public one.*" (Emphasis ours)

This brings us at last to our salient question whether the ultimate use of public waters in aid of coal mining is a "beneficial" or "public" use so as to confer upon Kaiser the power of eminent domain for a right-of-way to divert such water. We, of course, start with the proposition that private property can be taken only for public use and that the effect of the New Mexico decisional law is to carve out an exception to this constitutional mandate in recognition of overriding considerations born of necessity in an arid land where water is the life-blood of the community. Certainly the right of an individual to hold and enjoy property ought not be subjected to the carte blanche power of eminent domain simply because distribution of water "may promote the public interest and tend to develop the natural resources of the state." Clark v. Nash, supra. Each case must rest upon its own constitutional footing.

In some states "mining", like irrigation, is, to be sure, deemed to be public in character for the purposes of eminent domain. This is made so either by constitutional or statutory provision or court adjudication. See Inspiration Consol. Copper Co. v. New Keystone Copper Co., 144 Pac. 277, and cases collected there. And, this in no way violates the Federal Constitution. See Clark v. Nash, supra. But, the determination of what shall constitute a "public" use is a judicial question. See State v. District Court of Fourth Judicial District, supra. The mere fact that some states permit the taking of private property in aid of "mining" is not controlling here, for the New Mexico court in Gallup American Coal Co. v. Gallup Southwestern Coal Co., 47 P.2d 414, considering the precise industry of coal mining, rejected the public character of the industry with the observation that "As an essential or paramount industry, in its importance to the existence and functioning of the state and to the livelihood of the people [coal mining] does not seem to us to belong in a class with * * * irrigation in * * * New Mexico * * * . We consider it rather in a class with the timber or lumbering industry which was involved in the Threlkeld case. * * * It follows, that insofar as the statute impliedly declares a public use in the business or industry of coal mining, it is violative of the New Mexico Constitution, Article 2, §20." We think that case is controlling here. The court in Gallup was, to be sure, concerned with a statute other than 75-1-3. But, logic dictates that the New Mexico court would not deny the power of eminent domain in aid of coal mining under one statute, and sustain it under the statute invoked here merely because it speaks in terms of "beneficial use" of water.[1]

1. It is noteworthy that the particular type of taking is not disclosed in the Gallup opinion. For all we know the court might very well have been concerned with the taking of a right-of-way to divert water in aid of coal mining.

We hold that Kaiser had no power to take Ranch's land by eminent domain and that the Complaint stated a claim upon which relief could be granted. In this view of the case the question of inverse condemnation becomes academic. We will, however, comment to the extent that if Kaiser had followed the intricately detailed New Mexico statutory procedure for acquiring land by condemnation, the issues presented and decided here could have been litigated in an orderly manner in the courts of New Mexico where they belong.

The judgment is reversed and the case is remanded with directions to proceed in accordance with the views herein expressed.

United States Court of Appeals

TENTH CIRCUIT
SEPTEMBER 1967 TERM

W. S. RANCH COMPANY, a New Mexico Corporation,
Appellant,
vs.
KAISER STEEL CORPORATION, a Nevada Corporation,
Appellee.

No. 9295

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW MEXICO

A. K. Montgomery and Seth D. Montgomery (George W. Robertson, G. Gordon Robertson and Richard S. Morris with them on brief) for Appellant.

Paul A. Kastler and George T. Harris, Jr. for Appellee.

Before MURRAH, Chief Judge, BROWN* and HICKEY, Circuit Judges.

PER CURIAM:

The petition for rehearing is overruled. The motion to abstain pending determination of the declaratory action instituted by Appellee, Kaiser Steel Corporation on October 30, 1967, in the State District Court of Colfax County, New Mexico, is likewise denied.

BROWN, Circuit Judge, concurring and dissenting:

I concur with no reservations in the overruling of Kaiser's petition for rehearing. With like conviction I re-

*Of the Fifth Circuit, sitting by designation.

spectfully dissent from the denial of the motion to abstain pending State Court determination. This seeming contradiction perhaps deserves some elaboration.

First, on the correctness of the opinion constructed for the Court by the Chief Judge I have no misgivings. With the materials which we have—and which have been worked on, poured over, reworked, and reargued countless times in briefs, replys, rejoinders and motions—the conclusion reached certainly appears to be a permissible and probably the correct one. But that is not the equivalent of saying that the result announced here is what the Supreme Court of New Mexico would *now* declare. The *Erie*-lights are here dim, very dim. For all acknowledge that never before has the Supreme Court of New Mexico been invited to go down, find, locate, follow, or mark the path of the right of a private party to condemn private property over which to transport water to be used for mining purposes,[1] and if not dim, they shine both ways if not all ways.[2] But the Court is the first to recognize that although the controversy comes to us as an ordinary run of the mine private diversity suit, it is overcharged with the most fundamental of major public policies to New Mexico. Phrased with characteristic judicial understatement, the Court sounds this awareness at the outset of its analysis. "Undoubtedly," the Court states, "the decision in this case must necessarily have a far reaching effect." ..... F.2d ....., ... [No. 9295, 10 Cir., Oct. 12, 1967, at p. 5].

1. Thus the Court states: "It is conceded that this precise question of industrial use of public waters has never been presented to the New Mexico courts." —— F.2d ——, —— [No. 9295, 10 Cir., Oct. 12, 1967, at p. 5].

2. The opinion continues: "Both Ranch and Kaiser rely on the same New Mexico cases * * *, each contending for a different interpretation. The case law is not decisive * * *." —— F.2d ——, —— [No. 9295, 10 Cir., Oct. 12, 1967, at p. 5].

The stakes are high and the consequences portentous. Water, that vital natural resource, cuts a big figure in the economy, the official outlook of the state, and the jurisprudence of New Mexico. At least so far as federal constitutional aspects are concerned, the choice to be made is that for New Mexico alone. With the sketchy materials at hand, how can we say that it is the end use, the "ultimate use," that must confer the public benefit? And, even if there is really a choice between the alternatives phrased by the Court—a thing which I most earnestly doubt since the same problem is inherent in any effort to state it in terms of alternative or exclusionary categories—how are we to say that New Mexico declares that the use of water for irrigation will be "beneficial" to the public whereas the use of it as an indispensable requirement for the operation of an industrial enterprise would not be? True it is that if—as the Court holds—the public use is confined to the traditional one of irrigation in an arid country, there are less disturbing implications of a sociological, political, or economic nature. But Federal Judges—at least in these days—do not have the Keys to the Kingdom to determine for a sovereign state the internal domestic policies which it desires to follow.

In our modern complex economic structure, government—state and local—no longer confines its bounty to the traditional rural or agricultural objects. Nowadays there is open, frank recognition that business—yes, big business—is both legitimate, wholesome and very, very much desired. Thus we see state after state, city after city, operating within the limits of officially declared policy, seeking out industry beyond the borders of the state under aggressive programs of solicitation with the high hopes that some industrial enterprise can be persuaded to relocate within the pursuer's boundaries. The process in the typical legislative structure is something a good deal more

complex than simple, high-pressure salesmanship. Invariably it turns on state-authorized benefits, tax remissions, rental inducements and the like. And what is important here is that any such state-supported, state-authorized benefits inevitably fall upon members of the public and the cost is borne by property subject to taxation.

If—and the if today doesn't seem to be very great—property can fairly be taxed equitably and ratably to finance such economic inducements to business and industrial enterprise then it seems to me that subjecting private property to the prospect of condemnation at the hands of a private party is but a variation in the form of that burden. And probably, there is no burden at all since the taking requires just compensation.

From the standpoint of the economy of a city, a county, an area, or the whole state of New Mexico, a huge industrial enterprise such as the coal mining operation here involved may well be thought by the state to transcend either the value of the use of the water for traditional agricultural purposes[3] or the unsettling impact of a legislative policy allowing private parties under limited circumstances to exercise eminent domain over private property to transport water for use in further private activity.

With the stakes so high, the guiding materials so equivocal, the choice so wide open and the consequences one way or the other so devastating, what does good judicial administration suggest ought to be done? One thing it

3. Ultimate "private" use is a shibboleth. For it is conceded that a New Mexico farmer or rancher having water rights can exercise eminent domain to permit transportation of such water over intervening lands owned by others even though when finally on his land the waters will be used in the irrigation of crops or the raising of livestock on which he hopes to, and undoubtedly will, reap great profits in the private enterprise of a farmer.

suggests is that we ought not be doctrinaire either expressly or silently. Thus, *Meredith* v. *City of Winter Haven,* 1943, 320 U.S. 228, 64 S.Ct. 7, 88 L.Ed. 9, is not, as so often supposed, an absolute that under every and all circumstances a federal court in a diversity case has to plow through without calling on the state tribunals for aid in the divination of serious and troublesome state problems. Too much has gone on—indeed too much water has gone over the dam—for any such reading to be compelled. Putting to one side *Thibodaux,*[4] in which the Court of Appeals was reversed for failure to abstain for state court determination in a diversity case, the Supreme Court's repeated use of the Florida *Clay* type certification procedure demonstrates that the policy reflected in *Winter Haven* is not a road block. It is simply one of the factors to be assayed. Starting with *Clay*[5] the Supreme Court not less than three times has exploited fully the Florida procedure.[6]

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4. Louisiana Power & Light Co. v. City of Thibodaux, 1959, 360 U.S. 25, 79 S.Ct. 1070, 3 L.Ed.2d 1058. There, reversing the Fifth Circuit, the Court stated: "Informed local courts may find meaning not discernible to the outsider. The consequence of allowing this to come to pass would be that this case would be the only case in which the Louisiana statute is construed as we would construe it, whereas the rights of all other litigants would be thereafter governed by a decision of the Supreme Court of Louisiana quite different from ours." *Id.* at 30, 79 S.Ct. at 1073, 3 L.Ed. 2d at 1063.

See also Leiter Minerals, Inc., v. United States, 1957, 352 U.S. 220, 77 S.Ct. 287, 1 L.Ed. 2d 267: "[W]e think it advisable to have an interpretation, if possible, of the state statute by the only court that can interpret the statute with finality, the Louisiana Supreme Court. The Louisiana declaratory judgment procedure appears available to secure such an interpretation * * * and the United States may of course appear to urge its interpretation of the statute. *Id.* at 229, 77 S.Ct. at ____, 1 L.Ed. 2d at 275.

5. Clay v. Sun Ins. Office, Ltd., 1960, 363 U.S. 207, 80 S.Ct. 1222, 4 L.Ed. 2d 1170, on certification upon remand, Fla., 1961, 133 So. 2d 735, on receipt of answers to certification, 5 Cir., 1963, 319 F.2d 505, rev'd, 1964, 377 U.S. 179, 84 S.Ct. 1197, 12 L.Ed. 2d 229.

6. In addition to *Clay*, the other two cases are Aldrich v. Aldrich, 1963, 375 U.S. 249, 84 S.Ct. 305, 11 L.Ed. 2d 304, and Dresner v. Tallahassee, 1963, 375 U.S. 136, 84 S.Ct. 235, 11 L.Ed. 2d 208. Useful as *Clay* certification is to the Supreme Court and

To me the sound approach continues to be the one reflected in the unreversed action of the Court in *Delaney*.[7] And experience since that time continues to bear out the strong note sounded by the concurring opinion[8] that real injustice is done to litigants and, worse, more damage is done to the states' jurisprudence and its policies by a headstrong, resolute, inflexible determination on the part of a federal court to barge ahead in a sort of ascetic, misguided *Winter Haven* impulse, than will likely result from the slight delay occasioned by invoking state adjudication of the controlling issues.[9] For the simple fact is that more and more,[10] more federal courts are being overruled by more state courts on local issues upon which such federal courts have undertaken to read the *Erie* signs in the quest of the *Winter Haven* grail.

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to the Fifth Circuit its use is reserved to important questions. Run-of-the-mine cases with little recurring public importance are routinely given the *Erie* treatment. See, e.g. Motor Vehicle Cas. Co. v. Atlantic Nat'l Ins. Co., 5 Cir., 1967, 374 F.2d 601; Greer v. Associated Indem. Corp., 5 Cir., 1967, 371 F.2d 29; Hamilton v. Maryland Cas. Co., 5 Cir., 1966, 368 F.2d 768.

7. United Services Life Ins. Co. v. Delaney, 5 Cir., 328 F.2d 483 (en banc), *cert. denied*, 1964, 377 U.S. 935, 84 S.Ct. 1335, 12 L.Ed. 2d 298, *on motion for rehearing* en banc, 358 F.2d 714, *cert. denied*, 1966, 385 U.S. 846, 87 S.Ct. 39, 17 L.Ed. 2d 77.

8. See United Services Life Ins. Co. v. Delaney, *supra*, 328 F.2d at 485 (concurring opinion). The *Delaney* abstention procedure and the justification for it sought to be articulated by the concurring opinion have come in for some spirited criticism. See Agata, Delaney, *Diversity, and Delay: Abstention or Abdication?*, 4 Houston L. Rev. 422 (1966) (Special Fifth Circuit Issue).

9. Subsequent *Delaney* judicial events in neither the Texas State Courts nor the Fifth Circuit (traced in note 5, Aetna Life Ins. Co. v. Barnes, 5 Cir., 1966, 361 F.2d 685, 687) prove that when employed with a little enlightened resourcefulness on the part of either counsel, trial court, or appellate court the *Delaney* abstention is unworkable or administratively unsound. It is safe to say that no one on the Fifth Circuit, majority or dissenting, entertained for the briefest fraction of a possible division of a moment the idea that on recourse to the state courts after remand either counsel or the Texas courts would suppose that the single critical issue be excised for a sort of law-school academic inquiry in the declaratory judgment proceeding.

10. In the score sheet which follows (notes 11, 12, 13 and 14 infra), I do not repeat the cases documented in *Delaney*.

Texas, for example, continues on its path of independence in a number of instances[11] not the least of which was the Fifth Circuit's *Delaney* prediction itself.[12] But, this is not an infirmity of the Fifth Circuit alone.[13] And the experience in Florida demonstrates that state court reversals of Federal appellate decisions occur both in appeals of state cases[14] and on *Clay* certification (see note 5 supra) to the Supreme Court of Florida, the latter with some spectacular results.[15] For that matter, this Court has seen

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11. See, *e.g.*, Felmont Oil Corp. v. Pan-American Pet. Corp., Tex. Civ. App., 1960, 334 S.W. 2d 449, error ref'd n.r.e., which expressly refuses to follow Sinclair Oil & Gas Co. v. Masterson, 5 Cir., 1959, 271 F. 2d 310; see E. Brown, Law of Oil & Gas Leases, 1958: 1966 Cumulative Supplement, p. 293; Weymouth v. Colorado Interstate Gas Co., 5 Cir., 1966, 367 F. 2d 84, 102 n. 57.

12. Prof. Agata points this out. "Additionally and ironically, Judge Brown can now add *Delaney* to the list of wrong guesses. Concluding that 'judicial statesmanship of the highest and proper order' dictated permitting Texas courts to decide the legal issue, and noting that Texas 'has a judicial system which will permit adjudication with dispatch and speed' and 'with its full arsenal of procedural devices . . . will enable the parties to have a prompt and completely sufficient determination,' Judge Brown and his colleagues had again failed to anticipate the state court ruling. Texas refused to hear the case." (Citing Delaney v. United Services Life Ins. Co., Tex. Civ. App., 386 S.W. 2d 648, *aff'd*, Tex., 1965, 396 S.W. 2d 855). Agata, *supra* note 7, at 424.

13. See Yarrington v. Thornburg, Del., 1964, 205 A. 2d 1, *rejecting* Truitt v. Gaines, D. Del., 1961, 199 F. Supp. 143; Travelers Ins. Co. v. Auto Owners Ins. Co., 1964, 1 Ohio App. 2d 65, 203 N.E. 2d 846, *rejecting* American Fid. & Cas. Co. v. Indemnity Ins. Co. of North America, 6 Cir., 1962, 308 F.2d 697, Kelly v. State Auto Ass'n, 6 Cir., 1961, 288 F.2d 734, and Travelers Ins. Co. v. Ohio Farmers Indem. Co., 6 Cir., 1958, 262 F.2d 132.

14. Weed v. Bilbrey, Fla. Ct. App., 2d Dist., 1967, 201 So. 2d 771, rejecting outright Emerson v. Holloway Concrete Prods. Co., 5 Cir., 1960, 282 F.2d 271, 1961 AMC 1484, *cert. denied*, 1961, 364 U.S. 941, 81 S.Ct. 459, 5 L.Ed. 2d 372, 1961 AMC 1923, and expressly adopting the dissent of Brown, J., in the *Emerson* case, 282 F.2d at 278.

15. See, *e.g.*, Life Ins. Co. of Va. v. Shifflet, 5 Cir., 1966, 359 F.2d 501, upholding a jury verdict against the insurance company under the construction of the Florida Insurance Statutes on fraudulent misrepresentation. But then see, 5 Cir., 1967, 370 F.2d 555, granting a motion for rehearing and certifying the question to the Supreme Court of Florida, which in Life Ins. Co. of Va. v. Shifflet, Fla., 1967, 201 So. 2d 715, reached a result opposite from

and felt first hand the independence of one of its states over the strong protest that for a uniform oil lease clause in a routine contract dispute its declarations for Kansas would simply have to do for Oklahoma as well.[16]

Of course, having concurred in the opinion and in the denial of rehearing, I necessarily embrace without reservations the Chief Judge's statement that "we will, however, comment to the extent that if Kaiser had followed the intricately detailed New Mexico statutory procedure for acquiring land by condemnation, the issues presented and decided here could have been litigated in an orderly manner in the courts of New Mexico where they belong." ..... F. 2d ....., ... If we were not dealing with, indeed perhaps

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the one reached in the original Fifth Circuit opinion. On receipt of the answer to the certified question, the Fifth Circuit vacated the earlier judgment and remanded the case to the district court. See 380 F.2d 375.

And see especially Hopkins v. Lockheed Aircraft Corp., 5 Cir., 1966, 358 F.2d 347, in which the Court certified to the Supreme Court of Florida the controlling question of the dollar limitation on damages for wrongful death, a problem presenting fundamental and serious questions of state policy with only fragmentary case materials with which to work.[5] The determination of the question was so difficult, not only for the Federal Court in the light of intervening developments in the law of conflicts but also for the Supreme Court of Florida, that it resulted actually in two opinions before the question was settled. See the opinion at 201 So. 2d 743, holding that the situs state dollar limitation was contrary to Florida policy and the opinion at 201 So. 2d 749, where, on rehearing, the Court reversed itself to validate the Illinois recovery limitation. No amount of prescience, including that thought by some to come from a Federal Commission, enables a non-Florida Judge authoritatively to determine Florida policy.

16. See Williams, *The Role of Federal Courts in Diversity Cases Involving Mineral Resources*, 13 Kan. L.Rev. 375, 383-4 (1965), discussing the sequel to Rogers v. Westhoma Oil Co., 10 Cir. (Kansas), 1961, 291 F.2d 726. Despite the issuance of mandamus and, through the voice of my Brother Breitenstein, the strong remonstrance against forum shopping—an ugly word which does not mask that very motive for resort to a Federal rather than local court in an *Erie* case—by this Court in Lutes v. United States District Court, 10 Cir., 306 F.2d 948, on motion for modification, 308 F.2d 574, *cert. denied*, 1962, 371 U.S. 941, 83 S.Ct. 320, 9 L.Ed. 2d 275, the Supreme Court of Oklahoma rejected the *Rogers* reading of the Pugh clause for Oklahoma. Rist v. Westhoma Oil Co., Okla., 1963, 385 P.2d 791.

coming dangerously close to trifling or meddling with serious matters of great public moment and importance to New Mexico, I would be quite willing to breathe some life into that remonstrance to say to Kaiser that having chosen this awkward device it must live with the consequences of a Federal Court diversity determination with all its perils, its pitfalls, and the possibilty of its being wrong. But the real peril of this decision is that the victim is in no real sense either party to the cause. The one suffering is the State and its carefully nurtured, domestically contrived public policy.[17] Similarly, the fact that the motion is now made after the adverse decision of this Court, while a powerful circumstance in many situations, does not prevent the exercise of abstention now in view of these great public stakes.[18]

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17. Indeed the Attorney General of New Mexico in the relation of the State Engineer in a motion to appear as amicus curiae in effect urges us on behalf of the State of New Mexico to abstain pending determination by its own Courts of Kaiser's declaratory judgment suit filed October 30, 1967. On behalf of New Mexico the highest law officer asserts its concern and contends that Kaiser, not the Ranch, is correct in the interpretation of this basic New Mexico law. The motion states:

> "(2) The state of New Mexico has a vital public concern in the Court's interpretation and construction of section 75-1-3, * * * in its opinion filed herein October 12, 1967, its interest arising out of the impact of that interpretation of New Mexico law upon the development and distribution of the public waters of the state.

It then asserts that the State of New Mexico takes this position on the merits:

> "(a) New Mexico law grants the power of eminent domain for the purpose of diverting and conveying water under a valid water right across the lands of others, for application to beneficial use, and the taking of private property for such purposes is a taking for 'public use' under the New Mexico law * * *."

18. It has often been granted by an appellate court, including the Supreme Court. See United Gas Pipe Line Co. v. Ideal Cement Co., 1962, 369 U.S. 134, 82 S.Ct. 676, 7 L.Ed. 2d 623, and numerous other cases. As a matter of fact, by formal memoranda to the District Court, copies of which have now been made available to us, Kaiser made a like motion in the event that Judge Bratton had doubts—which he did not—asking that he remand the parties to the state courts for appropriate declaratory relief.

We know one thing for a certainty: the New Mexico "law" on this point is not settled by this case. Denying one of these parties the chance to get a determination now by the only Court which can authoritatively speak brings about one of those curious aberrations of the law in which the only party ultimately hurt is the one who happens to lose the particular case since all others will soon be protected.[19] For the Supreme Court of New Mexico is sure to speak and I would predict that it will speak soon, although I do not know which way it will speak. But considering the difficulty, if not the impossibility of a private litigant securing effective relief from a now already overburdened United States Supreme Court or releasing this Court from the impact of this decision as a matter of stare decisis,[20] about the only virtue an immediate decision has is that it is done. It is done now and delay is avoided. Delay, to be sure, is a thing we all strive to avoid and overcome. But what else is served? Is there any virtue in decision now simply for the sake of decision if—and the if is a very big one—the public importance of the question is certain soon to drive other litigants to the New Mexico Courts where the outcome may well be quite different? But different or not, authoritative decision will be made for the first time.

In the look back—even in the eyes of the pedagogical purists—about the only virtue it will have is that someone

19. "Thus it is that the only person who is hurt is the one who has no effective recourse to correct the error. Cf. Tipton v. Socony Mobil Oil Co., 5th Cir., 1963, 315 F.2d 660, 662, 667, 1963 AMC 1800, 1803, 1809 (dissenting opinion), reversed per curiam, 1963, 375 U.S. 34, 84 S.Ct. 1, 11 L.Ed. 2d 4." United Services Life Ins. Co. v. Delaney, *supra*, at 487. (concurring opinion).

20. See Atlantis Dev. Corp. v. United States, 5 Cir., 1967, 379 F.2d 818, 828; see also Lincoln Nat'l Life Ins. Co. v. Roosth, 5 Cir., 1962, 306 F.2d 110 (en banc), *cert. denied*, 372 U.S. 912, 83 S.Ct. 726, 9 L.Ed. 2d 720.

did his duty in the *Winter Haven* sense.[21] In the meantime, of course, Kaiser and Ranch know their rights. But no one else, and certainly not New Mexico, knows. Nor will they until New Mexico speaks. Why not listen?

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

W. S. RANCH COMPANY, a corporation
Protestant-Appellant,
vs.
KAISER STEEL CORPORATION, a corporation, EUAL A. MESSICK, DAISY C. MESSICK, and S. E. REYNOLDS, State Engineer of New Mexico,
Applicants-Appellees.

No. 8368

APPEAL FROM THE DISTRICT COURT OF COLFAX COUNTY
McINTOSH, JUDGE

ROBERTSON & ROBERTSON, Raton, New Mexico; MONTGOMERY, FEDERICI & ANDREWS, RICHARD S. MORRIS, Santa Fe, New Mexico, Attorneys for Appellant.

JOHN F. RUSSELL, Roswell, New Mexico; *WRIGHT* & KASTLER, Raton, New Mexico, Attorneys for Appellee Kaiser Steel Corporation.

BOSTON E. WITT, Attorney General, F. HARLAN FLINT, PETER B. SHOENFELD, Special Assistant Attorneys General, Santa Fe, New Mexico, Attorneys for S. E. Reynolds, State Engineer of New Mexico.

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21. From the standpoint of judicial administration in a substantive sense the outcome brings to mind Judge Friendly's lamentations. "'The compulsion felt by my brothers * * * to reach what seems a palpably unjust result reminds me of Chief Justice Erle's observation as to the occasional predilection of the best of judges for "a strong decision," to wit, one "opposed to common sense and to common convenience." * * *.' Spanos v. Skouras Theatres Corp., 2 Cir., 1966, 364 F.2d 161, 167." Lawrence v. United States, 5 Cir., 1967, 378 F.2d 452, 467 n. 44.

The district court affirmed the state engineer's approval of Kaiser Steel's application to change the point of diversion of certain adjudicated water rights, and W. S. Ranch appeals.

Although there are other connected topics, the basic issue has to do with the meaning and effect to be given to the final decree which adjudicated the water rights of the Vermejo Stream System in 1941. Under the decree, the maximum duty of water of the 163.4 acres with which we are concerned was adjudged "to be two acre-feet of water per annum per acre of land irrigated delivered at the land." These particular rights were junior to other rights of W. S. Ranch, and the point of diversion was below that of W. S. Ranch. Kaiser purchased the rights to 115 of the 163.4 acres, and applied to the state engineer for authority to change the point of diversion to a location above that of W. S. Ranch. The application sought to divert 230 acre-feet annually at a point some fifteen miles higher up on the stream system, and, of course, to dry up 115 acres, or 230 acre-feet of water, at the old location. The proposed transfer was also from agricultural to industrial use, for mining and coal-washing facilities.

At the hearing before the state engineer, considerable testimony was presented as to the amount of water available, the manner in which Kaiser would utilize the water, and the amount of return flow to the stream system; but Kaiser offered no testimony as to the extent to which water had been applied to beneficial use on the 163.4 acres involved. What little testimony there is as to application or non-application of water to beneficial use was brought out on cross-examination of one of Kaiser's witnesses. It is W. S. Ranch's position that even though the adjudication decree provided that the maximum duty was two acre-feet,

that this does not justify the transfer of this amount of water without an affirmative showing that such maximum has been applied to beneficial use and that the transfer can be made without detriment to existing rights.

The state engineer found that the change of place of use, and the change in purpose and point of diversion, could be made "without detriment to existing rights." Such a finding is required by law (§§75-5-22 and 75-5-23, N.M.S.A. 1953), but the question here is: Does the adjudication decree take the place of proof of the amount of water actually applied to beneficial use by a junior appropriator? It is our considered judgment that the adjudication decree is proof of the nature and extent of the rights sought to be transferred. The adjudication court determined that the water had been applied to beneficial use, thus satisfying the constitutional and statutory requirements. The state engineer could not do else than accept the court's decree. Were it otherwise, the engineer could, in effect, overrule, amend or revise an adjudication decree. This, of course, would offend not only the constitution but our statutes and decisional law.

The purpose of adjudications under the New Mexico statutory procedure is well stated in Harkey v. Smith, 1926, 31 N.M. 521, 247 Pac. 550, wherein we said:

> ". . . A careful re-examination of this legislation convinces us that there has been a departure from the old arid region doctrine of appropriation and seasonal or periodical appropriation, and that not [sic] the right to use water, either as to *volume or periods of use*, is regulated either by the permit of the state engineer, or the decrees of the courts. It is, of course, true that 'beneficial use shall be the basis, the measure, and the limit of the right to the use of water,' as is provided by section 3 of article 16 of our Constitution. But this pro-

vision merely declares the basis of the right to the use of the water, and in no manner prohibits the regulation of the enjoyment of that right. This legislation provides in section 23 that when water rights are adjudicated, the court shall declare as to each party the *priority, amount, purpose, periods, and place of use,* and, in case of irrigation, the lands to which the water shall be appurtenant. : . .

"It thus appears that all of these serious questions, leading so often to vexatious and disastrous litigation in regard to the appropriation of waters, both as to quantity and time, have been eliminated by this legislation. *Now the right of the water user is measured by* the permit of the state engineer or *the decree of the court.* It is the nature of the grant which prevents all future controversy as to the extent an [sic] character of the right.

". . .

"But under the old arid region doctrine it was necessary to hold that beneficial use, both as to volume and periods of time, was the evidence and measure of the right, and hence an irrigator might by conduct limit his right to certain periods of the year. Now, however, under our statute, the grant under the permit of the state engineer or the decree of the court marks the limit of the right." (Emphasis added.)

And in El Paso & R. I. Ry. Co. v. District Court of Fifth Judicial Dist., 1931, 36 N.M. 94, 8 P.2d 1064, it was pointed out why and in what manner New Mexico adjudications differ from those in Colorado. There we said:

"The allegations that petitioners have abandoned their rights or a portion of them, or that some of the use to which they have subjected the waters has been unlawful or wasteful, do not bring this case within those cited. Such issues are proper to be raised in the adjudication suit, where petitioners have submitted

the validity and extent of their right, and where all parties contesting or questioning it may be heard and may have their own rights established.

"It is true that Colorado adjudications are not so sweeping as ours, and that much more is left to the ordinary jurisdiction of equity. The adjudication determines priorities of ditches only. It is confined to the limits of a water district, which does not necessarily embrace a whole stream system. Priorities among consumers from the same ditch, and among appropriators in different districts from the same stream system, must be settled elsewhere. . . .

"Colorado was the leader in statutory state control and adjudication, with twenty-five years of experience before we undertook it. Undoubtedly its statutes and precedents furnished a background for our own legislation. Undoubtedly our adjudication was intended to be more comprehensive. Here stream systems as a whole are to be surveyed. Section 151-118, supra. All rights in the stream system are to be adjudicated. Sections 151-120, 151-122, supra. All claimants are to be parties. Section 151-122, supra. The owners of water rights, not the owners of ditches, are the parties. Snow v. Abalos, supra. In the light of Colorado's experience, we undertook a more thorough job. With North and South Dakota and Oklahoma, we are said to have based our statutes on the draft of Mr. Bean of the Reclamation Service. 2 Weil on Water Rights in the Western States (3d Ed.) p. 1480. Our scheme seems more logical. Whether it is so ambitious as to be impracticable remains to be determined."

It should therefore be plain that the Colorado cases so strongly relied upon by W. S. Ranch, particularly Farmers Highline Canal & R. Co. v. City of Golden, 1954, 129 Colo. 575, 272 P.2d 629, do not involve the same issue that is now before us. There being an adjudication decree, there was no necessity for Kaiser to offer proof of the nature and

extent of the rights sought to be transferred other than as specified by the adjudication decree. Cf., Public Service Company v. Reynolds, 1960, 68 N.M. 54, 358 P.2d 621.

We see nothing in the cases of Durand v. Reynolds, 1965, 75 N.M. 497, 406 P.2d 817; Public Service Company v. Reynolds, supra; Spencer v. Bliss, 1955, 60 N.M. 16, 287 P.2d 221; or Pecos Valley Artesian Conservancy Dist. v. Peters, 1948, 52 N.M. 148, 193 P.2d 418, which is contrary to what we have heretofore said. Thus there was no error in accepting the adjudication decree as proof of the water rights sought to be transferred.

W. S. Ranch argues that the finding, that the transfer would not be detrimental to existing rights, is unsupported by and contrary to the undisputed evidence. There was testimony that, as to at least 40 acres, there had been no water applied to the land for one, or perhaps two, years prior to the hearing before the state engineer. However, other than this testimony, there was no showing of any abandonment or forfeiture, nor was any particular reason given why the "existing right" should have been considered to be impaired. Cf., Cross v. Erickson, 1963, 72 N.M. 73, 380 P.2d 520. The year or years in question were particularly dry ones, and if there is no water available, the owner of the water right is not to be penalized. Section 75-5-26, N.M.S.A. 1953; and New Mexico Products Co. v. New Mexico Power Co., 1937, 42 N.M. 311, 77 P.2d 634. Although, of course, from this and other evidence a fact-finder might have determined that the change would be detrimental to existing rights, there is substantial evidence to the contrary. The engineer's ultimate finding of no detriment is based, in part at least, on the testimony of two former New Mexico state engineers. Although not intending to imply that the testimony of these individuals is entitled to any greater credence or weight than the expert

who testified to the contrary, nevertheless the testimony is certainly not such as should be ignored. This testimony and the other evidence in the record amply sustains the engineer's finding. Clodfelter v. Reynolds, 1961, 68 N.M. 61, 358 P.2d 626:

> "... However, the State Engineer is a highly qualified, able and competent engineer, acquainted with water problems. He heard the evidence and found that the diversion proposed in appellee's application will not impair the rights of any of appellants, or any other existing rights to the use of public waters. The district court also found that no prior existing rights will be impaired by the pumping of the proposed well. This was a controverted issue in the case...."

Allied to the above contention is the claim that the order permits Kaiser to make an extended use of the water right and amounts to a new appropriation. This argument is based upon the proposition that the Vermejo River is a "losing" stream and that there is more water available at the new place of diversion than at the old; that because of this, Kaiser is really obtaining a new appropriation for the additional water, but with the original priority date. This argument is at first blush plausible, because it was agreed by the expert witnesses that during most years there were times when there was insufficient water available to satisfy upstream rights which had a priority higher than those of the 163.4 acres. Nevertheless, the fallacy of the argument is apparent—Kaiser is only entitled to the amount of water that would be available at the old point of diversion as provided in the adjudication decree—it can take no more. Such is the position taken both by Kaiser and the state engineer, and in view of this concession by them, we see no reason to disagree. But as long as a decree remains in effect, Kaiser is entitled to take the amount of water adjudicated to this right, if, but only if, it can do so without detriment to the

rights of other water users on the stream. In this connection, we recognize that changing the place of diversion cannot enlarge or expand the water right at the expense of other appropriators or the state. Cf., Millheiser v. Long, 1900, 10 N.M. 99, 61 Pac. 111; and Hagerman Irrigation Co. v. McMurry, 1911, 16 N.M. 172, 113 Pac. 823. On the other hand, it is not analogous to Kelly v. Carlsbad Irrigation District, 1966, 76 N.M. 466, 415 P.2d 849, which was an application to change a point of diversion from surface to underground waters, where the surface flow had lost its identity as surface water.

We acknowledge that users of irrigation waters have a preference for a diversion point as high up on the stream system as possible, and we are not unmindful that, in irrigation practice, a higher diversion point is frequently preferred to a higher downstream priority. There would seem to be little question but that, pragmatically, these considerations may very well have prompted the protest to the instant proposed change in point of diversion.

To this end, W. S. Ranch urges that although the state engineer imposed certain conditions in conjunction with the granting of the change of point of diversion, the imposition of these conditions does not avail or prevent the detrimental effects of the transfer. Briefly, the conditions imposed limit the total annual amount of water which can be diverted, require the measurement and recording of water diversions and the return flow, protect certain junior appropriators, and, finally, state that the diversion shall not be exercised to the detriment of others. The whole argument on this point assumes that the transfer is detrimental to existing rights; but, conversely, if there is no detriment, we fail to understand how the conditions imposed do anything except give W. S. Ranch added assurance that its water rights will be protected. Theoretically, at least, the state

engineer, having determined that the transfer could be made without detriment to existing rights, could have stopped there and imposed no conditions. However, as a part of his duties in protecting and supervising the public waters of New Mexico, he imposed the conditions mentioned. Cf., City of Albuquerque v. Reynolds, 1962, 71 N.M. 428, 379 P.2d 73. Whether or not any conditions were imposed has no effect whatsoever on the right to damages which may or may not accrue to any other appropriator. Compare, Tevis v. McCrary, 1963, 72 N.M. 134, 381 P.2d 208. The conditions do, however, have the wholesome advantage of providing for a more adequate record than formerly existed.

We have made no mention of the action of the district court in approving the findings of the state engineer. The decision of that court was on the basis of the record before the engineer, and was fully in accordance with our decisions relating to review of the engineer's decisions. See, e.g., Durand v. Reynolds, supra, and discussion therein. Therefore, there is no reason to lengthen this opinion by reviewing the actions of the trial court.

In any event, the points on appeal are without merit and the judgment of the district court affirming the state engineer's action in granting the change of point of diversion to Kaiser Steel is affirmed. IT IS SO ORDERED.

s/ David W. Carmody
Justice

WE CONCUR:

s/ M. E. Noble J.

s/ J. C. Compton J.

Issued: March 18, 1968.

FILED
MAY 11 1968
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 1328

KAISER STEEL CORPORATION,
a Nevada Corporation,
Petitioner,

vs.

W. S. RANCH COMPANY,
a New Mexico Corporation,
Respondent.

AMICUS CURIAE BRIEF OF THE STATE OF NEW MEXICO ON THE RELATION OF THE NEW MEXICO STATE ENGINEER IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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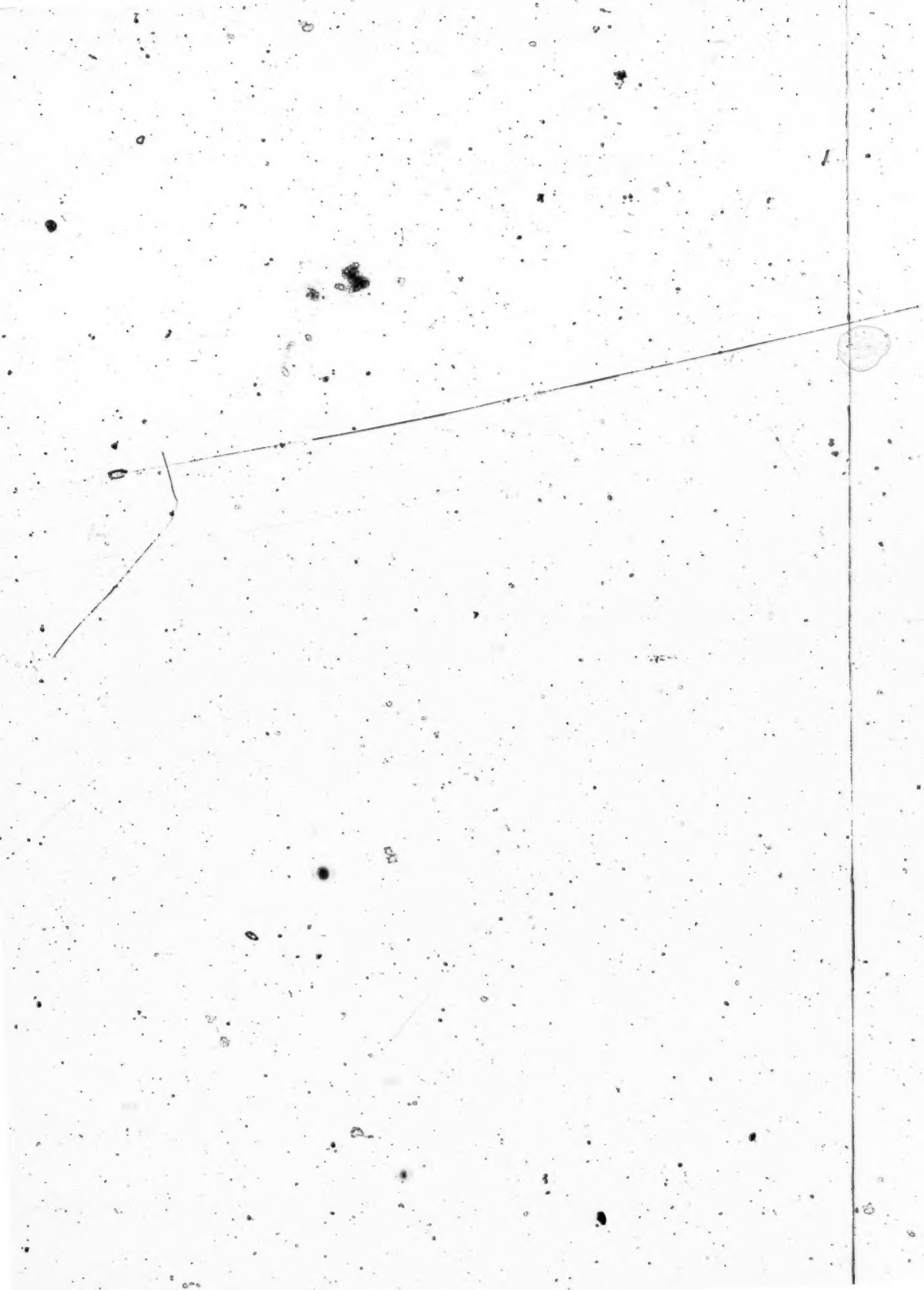

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IN THE

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OCTOBER TERM, 1967

No. 1328

KAISER STEEL CORPORATION,
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a New Mexico Corporation,
Respondent.

AMICUS CURIAE BRIEF OF THE STATE OF NEW MEXICO ON THE RELATION OF THE NEW MEXICO STATE ENGINEER IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

The State of New Mexico, on the relation of the New Mexico State Engineer, files this, its Brief Amicus Curiae, in support of the Petition for Writ of Certiorari filed herein by the Kaiser Steel Corporation. This brief is submitted pursuant to the authority of Rule 42 of the United States Supreme Court, and particularly Paragraph 4 thereof, permitting the filing of such briefs without consent when the brief is submitted in behalf of a State, sponsored by its Attorney General.

INTEREST OF AMICUS CURIAE

The State of New Mexico supports the Petitioner in its prayer that a Writ of Certiorari issue to review the Order of the United States Court of Appeals for the Tenth Circuit, entered in the above-entitled case on February 1, 1968, denying Petitioner's Motion to Stay Proceedings.

The State of New Mexico has a vital public concern in the interpretation of Section 75-1-3, New Mexico Statutes Annotated, 1953 Compilation, by the United States District Court for the District of New Mexico (Tr. 2, R. 14-19), and the opinion of the United States Court of Appeals, Tenth Circuit (Tr. 4, and reported in 388 F.2d 257). The interest of the State arises out of the impact of the interpretation of New Mexico law by the Federal Courts upon the New Mexico law of eminent domain and the development and distribution of the public waters of the State of New Mexico. The State adopts the "Citations to Opinions Below", "Jurisdiction", "Questions Presented", "Statutes Involved", and "Statement", all as set forth in the Petition for Writ of Certiorari filed herein by Kaiser Steel Corporation. Pursuant to the requirements of Paragraph 5 of Rule 42 of the United States Supreme Court Rules, this brief will include only:

(1) A statement of the interest of the *Amicus Curiae*,
(2) Argument, and
(3) Conclusion.

By Section 75-2-1, N.M.S.A. 1953 Comp., the Relator herein, the New Mexico State Engineer, is designated as the official of the State of New Mexico having general supervision of the waters of the State and of the measurement, appropriation, and distribution thereof. As such, he is the State official most directly concerned with the

application and administration of Chapter 75 of the New Mexico Statutes dealing with water. As the State official appointed by the Governor to supervise the distribution of the waters of the State, he is the representative of the Governor of the State of New Mexico in matters of water rights and administration, and water policy.

REASONS FOR GRANTING THE WRIT

POINT I

It Is Appropriate That the United States Supreme Court Review the Action of the Court of Appeals in Declining to Stay Further Proceedings in Order to Permit New Mexico Courts to First Pass upon an Important Issue of State Law

A. The substantive issue of state law decided by the Court of Appeals and the United States District Court is an issue of vital public concern to the State of New Mexico.

The importance of water in a semi-arid or arid area such as New Mexico need hardly be emphasized, and the interest of the State of New Mexico in the law and mechanics of water distribution is probably self-evident. However, a brief recitation of water supply facts may be helpful in putting the State's interest into perspective.

Precipitation in New Mexico is characterized by wide variability from point to point and from time to time. Annual averages vary from about 8 inches in the desert valleys to about 30 inches in the high mountains. Precipitation at Roswell, for example, which averages 13.53 inches per year, has ranged from a low of 4.35 inches in 1956 to a high of 32.92 inches in 1941. Statewide, the annual precipitation rate is much less than the rate of evaporation from water surfaces.

Precipitation over the State averages about 13 inches a year, for a gross product of roughly 85 million acre-feet.

Of this sum, about 3 million acre-feet appears as run-off in streams. The remainder returns to the atmosphere through evaporation and use by natural vegetation, or percolates into the earth as recharge to underground aquifers which do not discharge to streams within the State.

In addition to net water yield from precipitation within her borders, New Mexico of course receives annually, in a normal water supply period, about 2½ million acre-feet of stream flow from Colorado via the San Juan River and Rio Grande, and about 2,000 acre-feet from Arizona via the San Francisco River. Between the inflow to the State and the in-state surface-water yield, about 2 million acre-feet is used up in New Mexico and approximately 3½ million acre-feet is discharged to downstream States. While New Mexico is entitled to increase its present uses of water in some stream systems (the San Juan River and the Canadian River) under Interstate Compacts and court decrees in equitable apportionment suits, in most parts of the State there are presently existing more water rights than the safe annual yield of New Mexico's rivers and streams will regularly satisfy.

Even a casual glance at the map of New Mexico will demonstrate that streams with perennial flows are widely separated by vast intervening areas of dry land which must rely for water, to the extent it is available, upon the amounts of water in underground storage. Here again, many of the areas of the State relying upon groundwater for survival are withdrawing this irreplaceable resource at a rate exceeding its renewal by natural recharge through precipitation. In some areas no development is possible due to the absence, scarcity or poor quality of underground water. In most areas of the State, the total annual safe yield of the streams has been appropriated for many years,

and new development has relied upon the transfer of waters and water rights from existing historical uses to the proposed new uses.

Speaking generally, competition among various types of use in New Mexico has not yet become intense; such competition has not yet reached its peak because the industrialization and urbanization which the experts anticipate for New Mexico are just beginning. In 1950 our population was 681,000. In 1960 our population was 951,000, and experts of the Bureau of Business Research of the University of New Mexico predict that our population will increase to about 2¼ million by 1980. Whether or not these increases will occur depends, of course, on a number of factors, including the manner in which we manage our water resources and our ability to redistribute our limited resource among the competing demands.

The State's water program reflects a recognition of the need for the development of water for agricultural, municipal *and* industrial use, with attention to growing needs of water-related recreation. In some areas of the State, such as the San Juan and Canadian River valleys, current plans for the development of presently unused waters should meet the growing municipal and industrial needs. In other areas of the State, growing municipal and industrial needs can be met only by acquiring water rights presently being exercised for irrigation and transferring them to the new uses, usually with the concurrent necessity of physically transporting the water to the locale of use. In some instances the transfer can be accomplished by relocating the point of diversion or by relocating wells. In other instances, the lack of physical access to surface or groundwaters of suitable quantity or quality is such that the legal transfer of waters and water rights can be implemented only by means of conveyance of the resource

from those points where it is available to those points where it must be used.

There are, even today, numerous instances in which the physical transportation of water has been or will be an essential prerequisite to its application or continued application to beneficial use. Among these are the following:

1. Large-scale secondary recovery projects for the production of oil in southeast New Mexico, requiring the conveyance of water for injection.

2. Electric power generation from thermal plants in the Four Corners area of New Mexico, requiring the diversion of the surface waters of the San Juan River through pipelines to the plant sites.

3. The now-under-construction facilities of the Phelps Dodge Corporation in the southwestern portion of the State of New Mexico require the conveyance of water by means of pipeline for a distance of several miles, by reason of the unavailability of usable groundwaters in the vicinity of the multi-million-dollar milling operation.

A further example of the importance to the State of distribution of water may be found in the southwestern portion of the State. By virtue of the decision of the United States Supreme Court in *Arizona* v. *California*, 373 U.S. 546 (1963), an absolute upper limit on the total use of waters, both surface and underground, within a vast region of southwestern New Mexico is established by decree of the Court. No new uses of water in excess of these limitations may be initiated for any purpose within the area drained by the Gila and San Francisco stream systems, including their underground tributary sources.

By way of partial accommodation to this strict limitation on development, the State of New Mexico has negotiated with its sister State, Arizona, an agreement hope-

fully to be implemented by now-pending Federal legislation authorizing the Central Arizona Project and Hooker Dam and Reservoir in New Mexico. Representative of this legislation is HR 3300, recently reported out by the Committee on Interior and Insular Affairs of the United States House of Representatives. This Bill would ultimately permit additional consumptive uses of water in New Mexico in the amount of 48,000 acre-feet per year. Because of the limitations imposed by the decree in *Arizona* v. *California, supra,* and the unavailability of usable groundwater sources in much of the area of the Gila and San Francisco River systems, the ultimate utilization of this last available water supply will depend in large part upon the ability of those contracting for such waters with the Secretary of the Interior physically to convey the water to the sites where it will be used. Similar circumstances will prevail in connection with other Federal projects (Navajo Dam) and State reservoirs (Ute Dam).

Perhaps the current importance of Section 75-1-3, New Mexico Statutes Annotated, 1953 Comp., to the State of New Mexico can best be exemplified by reference to a "Memorandum" written by S. E. Reynolds, State Engineer for the State of New Mexico, on February 15, 1965. This memorandum, attached as Appendix A to this brief, was written on the subject of then-pending State legislation introduced in the House of Representatives of the New Mexico State Legislature during its regular session in 1965. The subject memorandum (Appendix A) was conveyed to the chairman of the House Judiciary Committee and the Chairman of the House Agriculture Committee by memorandum dated February 15, 1965, submitted in the name of S. E. Reynolds, State Engineer. The submittal memorandum is attached hereto as Appendix B to this brief. The subject legislation, which died in committee, sought to

> "strip private persons and corporations of this right [eminent domain] and reserve the power of condemnation for water storage and conveyance works to public bodies." (See Appendix A.)

It might be argued that the subject statute, whatever its importance may have been in the pioneer irrigation economy of New Mexico, is no longer a vital factor in the New Mexico scheme of water development and distribution. The above-mentioned memorandum negates this conclusion. It is stated therein (Appendix A):

> "This granting of the power of eminent domain to private individuals and corporations recognizes that the development, distribution and use of water is vital to the economy and the public welfare in arid and semi-arid states. . . . Even under present circumstances, the provisions of Section 75-1-3 can have an extremely important effect on the growing economy of the State. The statute in its present form in effect guarantees private persons and private corporations access to water with payment for damages as assessed by the Court if condemnation is necessary. If this guarantee is removed by the enactment of House Bill No. 249, perverse or curmudgeonly landowners could thwart development of our natural resources and industrial or agricultural enterprises to the detriment of the public interest in New Mexico."

It is also worthy of note that this expression of policy by the New Mexico State Engineer is entirely consistent with the total equality of *all* beneficial uses of the public water confirmed by the statutory and constitutional provisions governing water law in New Mexico.

It should be apparent that the State of New Mexico indeed has a vital public interest and concern with the manner of distribution of its finite supply of water in order that the public benefits to be derived from its use for the purposes of the future can be implemented.

B. The Court of Appeals has decided an important State question in a manner which may be or is in conflict with applicable State law.

The State believes that the Court of Appeals' decision that New Mexico law does not grant Petitioner the right to exercise the power of eminent domain to transport waters for beneficial use is erroneous.

As expressed by the "Motion of State of New Mexico on the Relation of the State Engineer for Leave to File Its Brief *Amicus Curiae*", filed in the United States Court of Appeals, Tenth Circuit, following the entry of the decision of that Court, it is the position of the State of New Mexico that:

> "New Mexico law grants the power of eminent domain for the purpose of diverting and conveying water under a valid water right across the lands of others, for application to beneficial use, and the taking of private property for such purposes is a taking for 'public purposes' under New Mexico law; . . . ." (Tr. 8).

The concern of the State arises from the fact that the decision of the Court of Appeals has decided an important State question in a manner which may be in conflict with applicable State law, and which we feel is clearly contrary to the policy of the State of New Mexico as expressed through its comprehensive code of water laws, its underlying Constitutional foundation, and its unified scheme of regulation and development of water resources. This legal and institutional framework has been developed over a period of time exceeding in duration the existence of the State of New Mexico itself. It may be inappropriate to suggest here that the State supports the view of New Mexico law expressed by the United States District Court for the District of New Mexico in its opinion below (Tr. 2, R. 14-19). However, it cannot be inappropriate

for the State to declare its interest in having this most important issue of State law and State Constitutional construction resolved in the first instance by the Courts of the State of New Mexico.

While we must concede as a matter of law that the issue of State law is unclear and difficult to resolve, we feel compelled to note that, in the view of *Amicus Curiae*, the "Memorandum Opinion" of the United States District Court herein represents a complete and accurate statement of the New Mexico law on the subject issue. The applicable statutes and decisions of the New Mexico Supreme Court have been fully discussed in the briefs below, and in the Petition for Writ of Certiorari filed herein. However, the equivalence of "beneficial use" and "public use" under New Mexico law seems to be so clearly demonstrated by the applicable Constitutional provisions that we set them forth at this point in full:

ARTICLE XVI, NEW MEXICO CONSTITUTION

"Section 1.

"All existing rights to the use of any waters in this State for any useful or beneficial purpose are hereby recognized and confirmed.

"Section 2.

"The unappropriated water of every natural stream, perennial or torrential, within the State of New Mexico is hereby declared to belong to the public and to be subject to appropriation for beneficial use, in accordance with the laws of the State. Priority of appropriation shall give the better right.

"Section 3.

"Beneficial use shall be the basis, the measure and the limit of the right to the use of water."

In the interest of brevity, we will not restate the arguments presented in the Petition for Writ of Certiorari. The State adopts the "Reasons for Granting the Writ" expressed therein.

CONCLUSION

For the foregoing reasons, and those expressed in the Petition herein, it is respectfully submitted that the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Memorandum

February 15, 1965

SUBJECT: House Bill No. 249; An Act Relating to Water Rights; Repealing Section 75-1-3 New Mexico Statutes Annotated, 1953 Compilation (Being Laws 1907, Chapter 49, Section 3, As Amended); And Enacting a New Section 75-1-3 New Mexico Statutes Annotated, 1953 Compilation.

Section 75-1-3 of our water code in its present form gives private persons and private corporations as well as the United States and the State the right of eminent domain to acquire right-of-way for works for the storage or conveyance of water. Enactment of House Bill No. 249 would strip private persons and corporations of this right and reserve the power of condemnation for water storage and conveyance works to public bodies.

Most western states have statutes similar to the present form of Section 75-1-3 in their water codes. This granting of the power of eminent domain to private individuals and corporations recognizes that the development, distribution, and use of water is vital to the economy and the public welfare in arid and semi-arid states. The New Mexico Supreme Court has found Section 75-1-3 in its present form constitutional and the United States Supreme Court has refused to overturn a Utah Supreme Court decision holding that because of the peculiarly arid climate of that state ". . . a statute permitting condemnation of a right-of-way for a ditch of a private individual was not unconstitutional."

Section 75-1-3 which was enacted in 1907 and a similar law enacted in 1877 undoubtedly had important effect on

the development and use of water in New Mexico. Without these laws such development and use would have been reserved to public bodies and to those owning the banks of our rivers and streams.

Even under present circumstances, the provisions of Section 75-1-3 can have an extremely important effect on the growing economy of the state. The statute in its present form in effect guarantees private persons and private corporations access to water with payment for damages as assessed by the court if condemnation is necessary. If this guarantee is removed by the enactment of House Bill No. 249, perverse or curmudgeonly landowners could thwart development of our natural resources and industrial or agricultural enterprises to the detriment of the public interest in New Mexico. On the other hand, it can be argued, as it has been in several cases on statutes such as Section 75-1-3, that no private individual or corporation should have under any circumstances the power to condemn for his purpose the property of another.

House Bill No. 249 presents a policy question of profound importance which should be weighed with extreme care in the legislative process.

It is suggested that, if House Bill No. 249 is to be enacted, the amendment set forth below should be made to maintain parallelism between the provisions of sub-section A and sub-section B:

1) Page 2, line 15, delete the word "and" and insert a comma after the word "States".

2) Page 2, line 15, insert the words "and of any local body as defined by law" after the word "state".

S. E. Reynolds,
State Engineer

SER: fhm

APPENDIX B

Memorandum

February 15, 1965

TO: The Honorable Finis Leroy Heidel, Chairman,
House Judiciary Committee, and
The Honorable Alva Parker, Chairman
House Agriculture Committee

FROM: S. E. Reynolds, State Engineer

SUBJECT: House Bill No. 249, An Act Relating to Water Rights; Repealing Section 75-1-3 New Mexico Statutes Annotated, 1953 Compilation (Being Laws 1907, Chapter 49, Section 3, As Amended); And Enacting a New Section 75-1-3 New Mexico Statutes Annotated, 1953 Compilation.

Herewith for your information is a copy of a memorandum dated February 15, 1965, discussing subject bill. I would appreciate the opportunity of appearing before your committees at the hearing on this bill.

Respectfully submitted,

S. E. Reynolds,
State Engineer

SER:fhm
cc: The Honorable Bruce King

Office-Supreme Court, U.S.
FILED
MAY 15 1968
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 1328

KAISER STEEL CORPORATION,
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Petitioner,

vs.

W. S. RANCH COMPANY,
a New Mexico Corporation,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 1328

KAISER STEEL CORPORATION,
a Nevada Corporation,
Petitioner,

vs.

W. S. RANCH COMPANY,
a New Mexico Corporation,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

OPINIONS BELOW

The opinions of the Court of Appeals, on the merits and on motion to stay proceedings, are reported at 388 F.2d 257, 262. These opinions and the unreported opinion of the District Court are printed in the Petition, Appendix B.

JURISDICTION

The jurisdictional requisites are adequately stated in the Petition.

QUESTION PRESENTED

In this diversity action, did the Court of Appeals abuse its discretion by refusing to abstain pending determination by the state courts of a clear question of state law, where the declaratory judgment suit raising the question was instituted and abstention requested only after the Court had rendered an adverse decision on the merits?

STATUTES INVOLVED

The following constitutional and statutory provisions, in addition to those printed in Appendix A to the Petition, are involved:

U. S. Const. Art. III, § 2: "The judicial Power shall extend . . . to Controversies . . . between citizens of different States . . . ."

28 U.S.C. § 1332(a) (1964): "The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between—(1) citizens of different States . . . ."

STATEMENT OF THE CASE

The procedural posture of the case is adequately presented in the Petition, pp. 3-5. However, additional facts deemed necessary to an adequate understanding of the issue involved, are set forth in the Argument below.

ARGUMENT

Petitioner has dutifully and faithfully tracked the requirements of Rule 19 of this Court. But the purely formalistic repetition of the considerations governing review on certiorari to a court of appeals cannot fill the void in a case wholly lacking in those considerations. That this is such a case will be quickly seen once the bare-bones structure of Petitioner's "Statement" is fleshed out with the factual background giving rise to this controversy.

Some time prior to April 28, 1966, Kaiser Steel Corporation ("Kaiser") entered into a long-term lease with a landowner in Colfax County, New Mexico, and constructed on the leased lands a coal mine (R. 12). In connection with its mining and processing operations at this mine, Kaiser required a supply of water. Presumably because any water rights available to the leased land were nonexistent or insufficient, it was necessary for Kaiser to purchase water rights appurtenant to land located some fifteen miles downstream from Respondent's ("Ranch's") land. (See Opinion, Supreme Court of New Mexico, Petition, p. A31.)

After purchasing these rights, Kaiser applied to the New Mexico State Engineer for a change in the point of diversion of the water from its original location to a point on Ranch's land, several miles southerly from the lands occupied by Kaiser (R. 13). This application was approved by the Engineer, and his approval was ultimately confirmed by the state Supreme Court (Opinion, Petition, p. A30). This approval meant that Kaiser was legally entitled to withdraw water from the new point of diversion on Ranch's land and to apply it to beneficial use at the coal mine several miles to the north.

It has never been contended, however, as indeed it could not be, that this action on the part of the State Engineer and the state courts carried with it the right to use Ranch's *land* for the purpose of transporting the water from point of diversion to place of use. In fact, the State Engineer's regulations provided, at the time Kaiser's application was approved, that

> "Rights-of-way for the works under any permit must be owned or controlled without controversy by the permittee. Conclusive proof in the form of an affidavit or certified copy of the right-of-way agreement should be filed with the State Engineer before the Certificate of Construction is issued."[1]

Nevertheless, on April 28, 1966, Kaiser entered upon Ranch's land and began construction of its water-diversion works—laying a pipeline, drilling wells and conducting other incidental activities (R. 2). This entry continued in the face of notification both before and after its initiation that it was unlawful and without right; it therefore constituted an intentional, willful, malicious and wanton disregard of Ranch's rights (R. 2-3).

As appears from the Petition, Kaiser purported to justify this occupation of a portion of Ranch's land by claiming the power of eminent domain. The statute relied upon was Section 75-1-3, New Mexico Statutes Annotated (1953 Compilation) (quoted at pp. A1-A2 of the Petition), which contains this sentence with reference to rights of way acquired by condemnation for pipelines or other works for the conveyance of water:

> "Such land and right of way shall be acquired in the manner provided by law for the condemnation and

1. State Engineer, *Manual of Rules and Regulations Governing the Appropriation and Use of the Surface Waters*, ch. V, p. 20 (rev. 1953). See also note 9 *infra* and *Coldwater Cattle Co. v. Portales Valley Project, Inc.*, 78 N.M. 41, ——, 428 P.2d 15, 22 (1967).

taking of private property in the state of New Mexico for railroad, telegraph, telephone and other public uses and purposes."

It is undisputed that the "manner provided by law" for the condemnation of property for railroad, etc., purposes is that detailed in N.M. Stat. Ann. sections 22-9-1 through 22-9-21. These statutory provisions establish a typical procedure for exercising the power of eminent domain by instituting a court action and paying the damages assessed. And they contemplate that a condemnor may gain the right of entry into the condemned premises during the pendency of the action by paying into court the damages preliminarily assessed by the court-appointed appraisers.[2]

Thus, on April 28, 1966, two courses were open to Kaiser: it could negotiate with Ranch for the needed pipeline right of way, or it could file an action in the state district court to condemn the easement. It did neither.

One can only speculate about the reasons prompting Kaiser's adopted course of action. Negotiation, of course, can be a time-consuming and expensive alternative. As to judicial condemnation, Kaiser must have been intimately familiar with the holding in *Gallup American Coal Co.* v. *Gallup Southwestern Coal Co.*, 39 N.M. 344, 47 P.2d 414 (1935): that a coal mining company is precluded by the state constitution from exercising the power of eminent domain in aid of its coal mining operations. The second alternative, therefore, threatened either complete failure or, at best, a period of litigation in the state courts before the easement could be secured. Both alternatives placed a roadblock of inconvenience in what can be assumed to have been, for Kaiser, a matter of some urgency: to get the mine open and into production.

2. See N.M. Stat. Ann. § 22-9-18.

And so, true to the tradition of the Old West, Kaiser chose to take first and litigate later.

Confronted with this invasion of its land and what to it was a palpable invasion of its rights, Ranch had either to shoulder the burden of going forward with a lawsuit or succumb to the assertion of naked power against it. Ranch decided to sue. Having so decided, Ranch faced the next question: where to sue?

One hundred seventy-seven years before, the Congress of the United States had provided a federal forum[3]—a forum that was available still.[4] Of course, there was also available a state-court forum in Colfax County—the county to which Kaiser Steel Corporation had so recently promised an economic boost in the form of a new coal mine. Ranch chose the federal court.

Kaiser responded to the complaint in trespass by asking that it be dismissed, "the specific point relied upon" being that "plaintiff's exclusive remedy, if any, is under" the state inverse condemnation statute[5] (R. 11). Thus the issue of the availability of the power of eminent domain to Kaiser was brought into focus.

It seems fair to assume that Kaiser was not altogether confident about the resolution of that issue, for appended to its memorandum brief in the District Court, apparently as a hedge against an unfavorable decision, was the suggestion that if the district judge disagreed with Kaiser, he should not decide at all but should "abstain." The District Court, however, agreed with Kaiser and dismissed the action for failure to state a claim upon which relief could be granted (R. 20).

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3. Act of Sept. 24, 1789 (First Judiciary Act), ch. 20, § 11, 1 Stat. 78.

4. 28 U.S.C. § 1332(a) (1964).

5. N.M. Stat. Ann. § 22-9-22, printed at pp. A2-A3 of the Petition.

On appeal, Ranch renewed its position that the statute was unconstitutional under the state constitution[6] if applied to enable Kaiser to condemn land in aid of coal mining and, in addition, attacked the District Court's conclusion (R. 14-15) that Kaiser, even if clothed with power to condemn, was immune from liability in trespass.

These two state-law issues—power to condemn and exclusiveness of the inverse condemnation remedy—were argued at length in Ranch's brief in chief, in Kaiser's answer brief, in Ranch's reply brief, and in full-dress oral argument before the Court of Appeals. By then, however, Kaiser had recovered the confidence it had lacked in the District Court, and so no suggestion was advanced that the trial court had erred in failing to abstain or that the Court of Appeals should now defer to a state tribunal.

In a unanimous opinion noteworthy for its painstakingly detailed consideration of numerous state Supreme Court decisions—both their holdings and their rationale—the Court of Appeals held with Ranch on the question of the state-law constitutionality of Section 75-1-3. The Court found itself unable to accept the patent fiction that a use of land in aid of coal mining, though declared by the state Supreme Court to be a private use for purposes of eminent domain, could somehow be transformed into a public use if a water pipeline were buried in the soil. And it found no indication that the state court would now accept this form of legal alchemy; on the contrary, it found that the court had, over and over again, consistently ruled that the character of a use of land as public or private must be measured by the ultimate use to which the land is devoted. (Opinion, pp. A16-A17 of Petition, 388 F.2d at 260-61.)

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6. N.M. Const. Art. II, § 20: "Private property shall not be taken or damaged for public use without just compensation."

Then came the frantic effort to salvage something. In a *blitzkrieg* of actions, motions and petitions, Kaiser instituted a declaratory judgment action in the Colfax County Court and simultaneously filed its motion to stay the proceedings, as well as a petition for rehearing. On the same day (October 30, 1967), the Cherokee & Pittsburg Coal and Mining Company (Kaiser's lessor) and the State Engineer filed their motions for leave to appear as *amici curiae* in support of Kaiser's position. That the Court gave this desperate, last-ditch effort fairly serious consideration appears from the absence of a ruling until February 1, 1968. But on that day the Court of Appeals exercised its discretion, refused to abstain and denied the pending motions.

POINT I

The Court of Appeals Correctly Decided an Issue of Clearly Settled State Law.

Does the judicial power of the United States which extends "to Controversies . . .—between citizens of different States . . ."[7] embrace the decision of issues of both law and fact, or only issues of fact? Since a limitation to fact issues only has never been suggested, diversity cases must inevitably arise in which resolution of the controversy turns on decision of purely state-law questions.[8] And it is certain that virtually no such case is controlled by a prior state pronouncement in a completely indistinguishable state-court lawsuit, for otherwise the federal-court suit would never have been brought. But it is equally true that there are numerous diversity cases in which the fed-

7. U. S. Const. Art. III, § 2.

8. "Resolution of local law questions is implicit in diversity of citizenship jurisdiction. Since *Erie R. Co.* v. *Tompkins*, 304 U.S. 64, the federal courts under that head of jurisdiction daily have the task of determining what the state law is." *England* v. *Louisiana State Bd. of Medical Examiners*, 375 U.S. 411, 426 (1964) (Douglas, J., concurring).

eral court finds itself left with the "inescapable impression"—to use Chief Judge Murrah's phrase (Opinion, p. A17 of Petition, 388 F.2d at 260-61)—that the state law requires a particular result.

Thus, in the case at bar, although it acknowledged that the "precise question" of New Mexico law had not been presented to the state courts, the unanimous Court of Appeals was led, "inescapably," to the conclusion that *Gallup American Coal Co.* v. *Gallup Southwestern Coal Co., supra,* was controlling.

There is no need to review the court's thoroughgoing analysis of the several state Supreme Court cases consistently limiting the applicability of Section 75-1-3 to "irrigation and other domestic purposes"[9] and focusing on the ultimate use of a taking in determining its public or private character. The opinion of the chief judge stands on its own feet and will convincingly rebuff any attempt to read into those cases a contrary rationale. Nevertheless, in order to emphasize the clarity of the state decisional law, and to controvert Kaiser's statement that the Court of Appeals' ruling implies "some distinction between irrigation, mining, and other beneficial uses of water, all of which are conspicuously absent from New Mexico law" (Petition, p. 8), the decisive language from the *Gallup American* case bears repeating:

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9. This limitation originated in the early case of *Albuquerque Land & Irr. Co.* v. *Gutierrez,* 10 N.M. 177, 231, 61 Pac. 357 (1900), *aff'd,* 188 U.S. 545 (1903). It has long been recognized in the State Engineer's administrative interpretation of the statute. The Engineer's regulations provide: "In New Mexico the diversion and distribution of water thru constructed works *for irrigation and other domestic purposes* is a public use and an appropriator may *exercise* the right of eminent domain *to acquire* necessary rights-of-way for canals, ditches, pipe lines, reservoirs, dams, etc." State Engineer, *supra* note 1, at 21. (Emphasis added.) Note also the administrative recognition that *acquisition* of a right of way by an *exercise* of eminent domain is necessary before the pipeline, etc., may be installed.

> "As an essential or paramount industry, . . . [coal mining] does not seem to us to belong in a class with . . . *irrigation* in . . . New Mexico, as appraised in . . . City of Albuquerque v. Garcia, 17 N.M. 445, 130 P. 118, and other New Mexico cases. We consider it rather in a class with the timber or lumbering industry which was involved in the Threlkeld Case.[10] * * *
>
> "It follows that, in so far as the statute impliedly declares a public use in the business or industry of coal mining, it is violative of N.M. Const. art. 2, § 20 . . . ."[11]

The distinction between irrigation and mining, which Kaiser asserts was "conspicuously absent from New Mexico law," was expressly drawn by the state Supreme Court in the *Gallup American* case. Not, to be sure, with reference to beneficial uses of water, for no one has ever questioned that the use of water for mining is a beneficial use. But what was involved in *Gallup American* was not, as it was not in the instant case, characterization of uses as *beneficial* or not for water law purposes; rather it was, as it was in this case, characterization of uses as *public* or not for purposes of eminent domain. The Court of Appeals refused to be led astray by Kaiser's clever attempt to confuse the two questions, and rightly held that its decision was controlled by the previous state declaration.

POINT II

The Court of Appeals' Refusal to Abstain Was a Proper Exercise of Discretion and Therefore Wholly Consistent with the Decisions of This Court.

In *Louisiana Power & Light Co.* v. *City of Thibodaux*, 360 U.S. 25 (1959), so heavily relied on by Petitioner, the

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10. *Threlkeld* v. *Third Judicial Dist. Court*, 36 N.M. 350, 15 P.2d 671, 86 A.L.R. 547 (1932) (lumbering held not a "public use" under N. M. Const. Art II, § 20).

11. *Gallup American Coal Co.* v. *Gallup Southwestern Coal Co.*, *supra*, 39 N.M. at 348, 47 P.2d at 416. (Emphasis added.)

Court held that abstention by the district court in the circumstances there involved was a proper exercise of "a fair and well-considered *judicial discretion* in staying proceedings . . . ."[12] This clearly implies for diversity cases what was established from the outset for federal-question cases:[13] that the question whether or not to abstain is answerable, within limits, by an exercise of discretion on the part of the court to which it is addressed.

In the instant case the question of abstention was not addressed in any meaningful sense to the District Court. True, it was mentioned in Kaiser's memorandum brief in that court and, true, the district judge could have considered it *sua sponte*. But the motion to dismiss was expressly confined to Ranch's alleged failure to state a claim for relief, and in any event no review of the trial court's failure to abstain was sought in the Court of Appeals and none is sought here.

Consequently, abstention became a live issue only when the Court of Appeals was asked to stay its hand; it is the first and only court whose discretion has been invoked to consider that issue. For this Court to grant the relief re-

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12. 360 U.S. at 30. (Emphasis added.) The Court also characterized the district court's action as "a conscientious exercise by the federal district judge of his *discretionary power* . . . ." *Id.* at 27 n. 2. (Emphasis added.)

13. See *Railroad Comm'n.* v. *Pullman Co.*, 312 U.S. 496, 500-01 (1941), particularly the passage quoted at p. 13 of the Petition. See also *Baggett* v. *Bullitt*, 377 U.S. 360, 375 (1964): "The abstention doctrine is not an automatic rule applied whenever a federal court is faced with a doubtful issue of state law; it rather involves a discretionary exercise of a court's equity powers. Ascertainment of whether there exists the 'special circumstances,' . . . prerequisite to its application must be made on a case-by-case basis."

Some commentators applaud the recognition of this area of trial-court discretion and advocate its expansion. See, *e.g.*, Wright, *The Abstention Doctrine Reconsidered*, 37 Tex. L. Rev. 813, 825 (1959); Note, *Abstention: An Exercise in Federalism*, 108 U. Pa. L. Rev. 226, 251 (1959).

quested by Kaiser would thus require a holding that the Court of Appeals abused its discretion, for surely a refusal to abstain, if the question falls within the permissible bounds of discretion at all, is just as much an exercise of that discretion as is a decision to abstain.[14]

Perhaps, however, the circumstances of this case remove it from the area properly referable to judicial discretion. If so, then they clearly place it on the side of those decisions holding that a federal court has no discretion to decline to exercise its properly invoked jurisdiction.[15] Of special pertinence here is *County of Allegheny* v. *Frank Mashuda Co.*, 360 U.S. 185 (1959). The question there was "whether the District Court had discretion to abstain from the exercise of jurisdiction in the circumstances of this case." 360 U.S. at 188. The answer was that it did not.

One analyst suggests[16] that the apparent conflict between *Thibodaux* and *Mashuda* can be reconciled in a liberal grant of discretion to abstain or not to abstain in the trial court—a discretion limited, nonetheless, by the necessity for "exceptional circumstances," found absent in *Mashuda*. Whether or not this basis for reconciliation exists, *Mashuda* seems far closer to the present case than *Thibodaux*. In the first place, as has been shown above, the "unsettled state law" circumstance, of such crucial importance in *Thibodaux*,[17] is lacking here. As in *Mashuda*, the relevant state law is clear that eminent domain cannot be exercised for private purposes. Additionally, the state law is

14. See *Hostetter* v. *Idlewild Bon Voyage Liquor Corp.*, 377 U.S. 324, 328-29 (1964).

15. *E.g.*, *County of Allegheny* v. *Frank Mashuda Co.*, 360 U.S. 185 (1959); *Propper* v. *Clark*, 337 U.S. 472 (1949); *Meredith* v. *Winter Haven*, 320 U.S. 228 (1943).

16. Note, 108 U. Pa. L. Rev. 226, 247-48 (1959).

17. See *Louisiana Power & Light Co.* v. *City of Thibodaux*, *supra*, 360 U.S. at 31 (Stewart, J., concurring).

likewise clear that coal mining is just such a private purpose.[18] Whereas the state statute in *Thibodaux* had never been judicially construed, the statutory and constitutional provisions here have undergone judicial scrutiny a number of times,[19] and the pattern which they form was clearly discernible by the Court of Appeals.

A second similarity between *Mashuda* and this case lies in their parallel procedural postures. Both cases challenge the validity of expropriations of property; both are attempts to oust the purported condemnor from its illegal occupancy. Thus, although both involve issues of state eminent domain law, neither is itself a condemnation action. *Thibodaux*, however, was an actual eminent domain proceeding, begun in state court and removed to federal court. The significance of this distinction is that it vitiates the importance claimed in the Petition for the fact that this case concerns the power of eminent domain. As the Court observed in *Mashuda*, that fact "no more justifies abstention than the fact that [the case] involves any other

18. In *Mashuda* the Court characterized as "purely factual" (360 U.S. at 190) the question whether land leased by the county to a private corporation was devoted to public or private use. But is that question so necessarily one of "fact" rather than "law," particularly in view of the dissenting opinion's notation (360 U.S. at 199 n.1) that the leased land was to be used in connection with the county's enlargement of the airport? Arguably, the *Mashuda* question could have been treated as at least partly "legal" and therefore one as to which, for all we know, the state law may have been unsettled. In any event, the notoriously elusive law-fact dichotomy would seem to be a slippery footing upon which to predicate a hard-and-fast rule. This suggests another consideration favoring the recognition of discretion in the trial court.

19. See the Court of Appeals' Opinion, Petition, pp. A14-A16, A18, 388 F.2d at 259-60, 261. This difference between situations with little or no judicial precedent bearing on the state-law issue and those where related or analogous state decisions are available to guide the federal court's determination has been cited as a second ground for reconciling *Thibodaux* and *Mashuda*. Note, 108 U. Pa. L. Rev. 226, 249 (1959). "For this essentially deductive task the federal courts are as well equipped as are the state courts themselves." *Ibid.*

issue related to sovereignty." (360 U.S. at 192.) To the extent that the *Thibodaux* pronouncement on the "special nature" of eminent domain retains any vitality after the refutation in *Mashuda*,[20] the procedural alignment of this case with the latter makes that pronouncement inapposite.

Kaiser's assertions to the contrary notwithstanding, there is a third ground of similarity between the instant case and *Mashuda*:

> "[A]djudication of the issues in this case by the District Court would present no hazard of disrupting federal-state relations. The respondents did not ask the District Court to apply paramount federal law to prohibit state officials from carrying out state domestic policies, nor do they seek the obvious irritant to state-federal relations of an injunction against state officials." 360 U.S. at 189-90.

The considerations favoring abstention in *Burford* v. *Sun Oil Co.*, 319 U.S. 315 (1943), and *Alabama Pub. Serv. Comm'n* v. *Southern Ry.*, 341 U.S. 341 (1951), are simply not present here.

The primary factor motivating both *Burford* and *Alabama* was the desire to avoid federal-court interference with state administrative action, typically that of a regulatory commission.[21] This clearly appears from the detailed examination in both opinions of the respective regulatory programs involved. Avoidance of such interference accomplishes several objectives: it prevents the "ob-

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20. When the *Thibodaux* opinion is read in the historical context of the equitable origins of the abstention doctrine, the suggestion is not at all unwarranted that "The Court's emphasis . . . on the special nature of a state eminent domain proceeding may be read as no more than a response to objections that abstention was not appropriate in that case because the relief sought was not equitable in nature." Note, *Judicial Abstention from the Exercise of Federal Jurisdiction*, 59 Colum. L. Rev. 749, 763-64 (1959).

21. See Note, 59 Colum. L. Rev. 749, 759 (1959), stating that the cases have been limited to this situation.

vious irritant," referred to in *Mashuda*, of a federal injunction against state officials; it respects the state's referral of complex local problems to a specialized agency; and it preserves the important state-court function of review of the agency determinations.[22]

The case at bar presents none of these considerations. Although Section 75-1-3 is one of the sections constituting the state's Water Code, to describe it as part of a "comprehensive code" for regulating the state's water resource is only to mislead. Unlike the state statutes relating to rights in *water*, this provision for acquiring *land* is administered by no regulatory officer or agency. The State Engineer is in no way entrusted with its administration, and by its own terms the statute is to be invoked in a judicial action by the particular water user claiming its benefit.

The superficial resemblance between *Burford* (oil) and this case (water) should not be permitted to obscure their fundamental differences. The lower courts were not here concerned with the sometimes difficult hydrological problems that are the province of the State Engineer, for all that is involved is the availability of an easement by condemnation of another's land. To paraphrase *Mashuda*, surely a right of way for water transportation

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22. See id. at 761. The *Alabama* form of abstention also undoubtedly encompasses some of the policy considerations underlying the common administrative-law requirement of exhaustion of administrative remedies. See Note, 16 Wes. Res. L. Rev. 937, 941-42 (1965).

Another prominent factor motivating *Burford* and *Alabama* was the principle, derived from *Pennsylvania* v. *Williams*, 294 U.S. 176 (1935), that a federal court has discretion to withhold unnecessary and extraordinary equitable relief. See *Burford* v. *Sun Oil Co.*, *supra*, 319 U.S. at 334-35 (Douglas, J., concurring). This has led to the conclusion that the two cases are not "true" abstention cases. Gowen & Izlar, *Federal Court Abstention in Diversity of Citizenship Litigation*, 43 Tex. L. Rev. 194, 198-200 (1964).

> "is no more mystically involved with 'sovereign prerogative' than a State's power to regulate fishing in its waters, . . . its power to regulate interstate trucking rates, . . . a city's power to issue certain bonds without a referendum, . . . its power to license motor vehicles, . . . and a host of other governmental activities . . . ." 360 U.S. at 192.

For the same reasons, Kaiser's dire predictions of the "adverse effect" the Court of Appeals' decision will have on the "economic development" of the state are devoid of substance. Even if such predictions were remotely likely to be realized, they would not excuse a diversity court from following a clear expression by the state Supreme Court that the policy embodied in the state constitution has, in this instance, to be given primacy. The state court has held that a coal mining company cannot condemn private property. Apart from the total lack of any indication that this holding has itself had an "adverse effect" upon the state's economic development, the policy choice, if there is one, has been made. Surely it is not too much to ask a federal court to effectuate that choice in a different factual setting.

The only substantial consideration favoring abstention raised by the Petition is the fact that a state statute has been declared unconstitutional in a particular application. Were it not for this factor there would be no basis at all for characterizing the Court of Appeals' refusal to abstain as discretionary; it would be mandatory.

But the nature of the Court of Appeals' declaration must not be forgotten; this is no instance of a confrontation between federal policy and state policy; the District Court was not asked (as it was not in *Mashuda*) to apply "paramount federal law" in striking down a state statute. Hence, one of the very strong policy underpinnings of the *Pullman*

doctrine—avoidance of needless friction with state policies[23] —is entirely absent. It is not enough that a unit of the federal judicial system, as opposed to that of the state, has ruled against the statute as here sought to be applied, for (again as in *Mashuda*) the Court of Appeals was simply "applying state law in the same manner as would a state court." That the state law to be applied was found in the state constitution, as interpreted by the state's highest court, surely does not mitigate the duty to apply it. Had such interpretation been absent, abstention to procure it might have been justified; but with the clear policy of the state's judiciary already enunciated, the Court of Appeals' decision to proceed was clearly a proper use of its discretionary power.

That the Court of Appeals correctly exercised its discretion is apparent in a fourth and final similarity between *Mashuda* and this case:

> "The undesirability of a refusal to exercise jurisdiction in the absence of exceptional circumstances which clearly justify an abstention is demonstrated by the facts of this case. Respondents have consumed considerable time and expense in pursuing their claim that their property has been unlawfully taken. To order them out of the federal court would accomplish nothing except to require still another lawsuit, with added delay and expense for all parties. This would be a particular hardship for the respondents, who, besides incurring the added expense, would also suffer a further prolonged unlawful denial of the possession of their property if ultimately they prevail against the County and its lessee. It exacts a severe penalty from citizens for their attempt to exercise rights of access to the federal courts granted them by Congress to deny them 'that promptness of decision which in all judicial actions is one of the elements of justice.'" 360 U.S. at 196-97.

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23. See Note, *Federal-Question Abstention: Justice Frankfurter's Doctrine in an Activist Era*, 80 Harv. L. Rev. 604, 605 (1967).

Related to these considerations is Kaiser's statement that resort to abstention is not precluded because of the tardiness with which the issue was raised. No doubt, as an abstract proposition of law, this is true; but can it reasonably be contended that the failure to file the now pending declaratory judgment suit and to raise the abstention issue until eighteen days after the court's ruling on the merits should not have exerted a powerful influence on the way in which the court determined to exercise its discretion?[24]

POINT III

Any Conflict Among the Circuits Is a Conflict Only As to the Permissible Range of Discretion to Abstain, and This Case Is Inappropriate to Resolve Any Such Conflict.

If it is true that there is an area of discretion within which a federal court may properly decide to abstain or not to abstain, depending on its assessment of the several competing considerations involved, then the mere fact that one court in a diversity case chooses to postpone jurisdiction while another chooses to proceed cannot serve as a basis for finding a "conflict" between the two choices. Certainly any such "conflict" is not of the sort requiring resolution by the United States Supreme Court. Accordingly, the decisions in *United Serv. Life Ins. Co.* v. *Delaney*, 328 F.2d 483 (5th Cir. 1964),[25] and *Tomiyasu* v. *Golden*, 358 F.2d 651

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24. See *Merritt-Chapman & Scott Corp.* v. *Frazier*, 289 F.2d 849, 853 (9th Cir.), *cert. denied*, 368 U.S. 835 (1961): "[T]he lower court did not abuse its discretion by refusing to stay the proceeding before it. The defendant had already submitted these very issues [of state law] to the District Court and only after an adverse decision solicited the State Court to pass upon them. Justification for the denial of the stay might well be rested on that fact."

25. *Cert. denied*, 377 U.S. 935 (1964), *opinion after stay*, 358 F.2d 714 (5th Cir.), *cert. denied*, 385 U.S. 846 (1966).

(9th Cir. 1966), cannot be viewed as conflicting in any meaningful sense with the lower court's refusal to abstain here. Each is an example of a federal court's declining jurisdiction for reasons that seemed sufficient to itself: *Delaney* turned on the unsettled character of the state law, *Golden* on avoidance of "an unwarranted intermeddling in the procedures of the Nevada courts." (358 F.2d at 655.)

In the present case, the Court of Appeals had the motion to stay under consideration for three months before denying it. Briefs were filed by both Ranch and Kaiser on the abstention question, and a vigorous dissenting opinion was written by Judge Brown. It must be assumed that the majority considered the question thoroughly, and found this to be an inappropriate occasion for abstention. Surely this finding was well within the permissible range of sound judicial discretion.

Moreover, the motion to stay was denied without opinion. It cannot, therefore, be regarded as anything *more* than a discretionary refusal to abstain; it is not an enunciation of a set of principles clearly contrary to those implicit in either *Delaney* or *Golden*. Had the court chosen to write a full-dress opinion to oppose Judge Brown's, there might be reason to discern a conflict with *Delaney*. But no opinion was written and no visible conflict exists.

It cannot be denied, however, that an underlying conflict in philosophy probably does exist between the implications of *Delaney* and the criteria followed by the other circuits in diversity cases where abstention is an issue. Respondent, for one, has no hesitancy in expressing its belief that *Delaney* was wrongly decided; that it rests on principles contrary to those so clearly stated in *Meredith v. Winter Haven*, 320 U.S. 228 (1943),[26] and reaffirmed in

26. "[T]he difficulties of ascertaining what the state courts may hereafter determine the state law to be do not in themselves afford a sufficient ground for a federal court to decline to exercise its jurisdiction to decide a case which is properly brought to it for decision." 320 U.S. at 234.

Mashuda; and that, with deference, Judge Brown's concurring opinion there and his dissent here, while eloquent pleas for remedial legislation, do not respond adequately to the duty imposed by the diversity jurisdiction.[27] Respondent finds far more palatable these words of Judge Brown, uttered in the not-too-distant past:

> "A United States District Court clothed with power by Congress pursuant to the Constitution is not a mere adjunct to a state's judicial machinery. In entertaining diversity cases it is responding to a constitutional demand made effective by congressional action and, as the recent abstention cases have made so clear, [citing *Mashuda* and the other 1959 cases] it has a constitutional duty to hear and adjudicate. [Citing *Meredith*]"[28]

But it will be time enough to resolve these perhaps inconsistent statements of Judge Brown and these perhaps inconsistent premises in *Delaney* and other circuit cases when a lawsuit arises that adequately presents the issues for review. Here, the absence of an opinion, the clear exercise of permissible discretion, and the other factors assayed in this Brief make the case a most inappropriate one with which to attempt that resolution.

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27. *Delaney* has received almost uniformly unfavorable comment in the law reviews. See, *e.g.*, Agata, *Delaney, Diversity, and Delay: Abstention or Abdication?*, 4 Houston L. Rev. 422 (1966); Note, 40 Tul. L. Rev. 578, 594 (1966); Comment, 45 B.U.L. Rev. 109, 116-18 (1965); Note, 73 Yale L. J. 850, 855-56 (1964). *But see* Note, 38 Temple L. Q. 72, 78 (1964).

28. *Monarch Ins. Co. v. Spach*, 281 F.2d 401, 407 (5th Cir. 1960). See also *Delduca v. United States Fid. & Guar. Co.*, 357 F.2d 204, 206 (1966) (construction of state public works act in diversity case): "That our task is not an easy one or the footing somewhat unsure in the quest for the Florida rule does not make our obligation any less. [Citing *Meredith*, cf. *Delaney*] . . . We must do the best we can utilizing all the currents which indicate the way the *Erie* . . . wind blows."

POINT IV

The Tenth Circuit Has Not Decided Any Question of Federal Law.

That the Tenth Circuit decided *something* when it denied Kaiser's motion to stay cannot, of course, be denied. But what did it decide? It decided that in this diversity case—in which it felt unanimously that the proper conclusion of state law was "inescapable," in which there was no danger of a clash between state policies and paramount federal policies nor of the irritant of an injunction against state officials, in which no disruption of a state administrative program was threatened, in which the plaintiff (if the allegations of the complaint were true) had been the victim of a continuing trespass for nearly two years and could look forward to still more litigation before that tort could be redressed, in which a referral to the state courts would create the hazards of even more protracted litigation and of additional expense and inconvenience, in which the abstention issue was not even raised until after the court had heard and decided the case on the merits, in which the defendant could have avoided the issue in the first place by bringing the appropriate condemnation action in the state court, and in which it felt impelled to exercise its diversity jurisdiction under the congressional mandate and that of this Court in *Meredith* v. *Winter Haven*—it should not abstain.

Was this the decision of an "important question of federal law"?

Perhaps it is true that important questions of federal law in the abstention area remain to be decided by this Court. Perhaps the cross currents in the *Mashuda* and *Thibodaux* opinions must someday be harmonized. Per-

haps the thesis that abstention is *never* proper in diversity cases and that *Thibodaux* itself was wrongly decided[29] must eventually be explored. Perhaps even the doubts about the abstention doctrine in its entirety[30] must ultimately be brought to the surface and either vindicated or placated. But those questions should await the arrival of a case fairly presenting them; a case more unsuitable than this for considering them can scarcely be imagined.

POINT V

The Decision Below Is Clearly Consistent with the Accepted and Usual Course of Judicial Proceedings.

To label the Court of Appeals' refusal to abstain a *departure* from "accepted and usual principles" is to ignore all of the abstention-diversity cases in this Court, including *Thibodaux*. Abstention is the *exception*, not the rule, in diversity suits. Enough has been said in this Brief to show that the requisite "exceptional circumstances" do not exist.

Suppose this Court did exercise its supervisory power —what are some of the possible consequences? At best, assuming a remand to the Tenth Circuit in the fall of 1968, a declaratory judgment by the state trial court might conceivably be rendered by the end of the year. The appeal to the state Supreme Court would certainly not be disposed of in less than six months. Thus, if the state court agreed with the Court of Appeals, the case would finally be remanded to the District Court in the fall of 1969—a lapse of 3½ years from the filing of the complaint to the overruling of the motion to dismiss! Even if the state Supreme Court

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29. See Agata, *supra* note 27, 4 Houston L. Rev. 422, 428 *passim*.

30. See, *e.g.*, *England* v. *Louisiana State Bd. of Medical Examiners*, 375 U.S. 411, 423-37 (1964) (Douglas, J., concurring); Clark, *Federal Procedural Reform and States' Rights; to a More Perfect Union*, 40 Tex. L. Rev. 211, 221-25, 229 (1961).

disagreed with the Tenth Circuit, the litigation would not be concluded; the Court of Appeals would then have to consider the inverse-condemnation exclusive-remedy issue raised on the original appeal. Would it be required to abstain on that issue as well? If so, would *another* declaratory judgment action and *another* state-court appeal be necessary?

This litigious nightmare can quickly be made more horrible by considering the post-abstention phase of *Delaney*. The Texas declaratory judgment action was dismissed by the trial court because, it held, the parties were seeking an advisory opinion. The dismissal was successively affirmed by the intermediate court of civil appeals and the Texas Supreme Court.[31] The case then went back to the Fifth Circuit which, more than two years after its abstention, finally decided on the merits.[32] That a similar result might easily obtain in this case is evident from the state Supreme Court's refusal to give advisory opinions.[33] Moreover, the New Mexico Supreme Court has held that the exercise of jurisdiction in a declaratory judgment proceeding is discretionary with the trial court, particularly where the issue is pending in another lawsuit between the same parties.[34]

Consequently, there is no assurance whatever—indeed, there is considerable indication to the contrary—that the issue raised in Kaiser's last-minute declaratory judgment

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31. *United Serv. Life Ins. Co.* v. *Delaney*, 396 S.W.2d 855 (Tex.), *affirming* 386 S.W.2d 648 (Tex. Civ. App. 1965).

32. *United Serv. Life. Ins. Co.* v. *Delaney*, 358 F.2d 714 (5th Cir.), *cert. denied*, 385 U.S. 846 (1966).

33. See *Bell Tel. Labs., Inc.* v. *Bureau of Rev.*, 78 N.M. 78, ____, 428 P.2d 617, 623 (1966), *appeal dismissed*, 388 U.S. 457 (1967); *City of Carlsbad* v. *Ballard*, 71 N.M. 397, 399, 378 P.2d 814, 815 (1963).

34. *Allstate Ins. Co.* v. *Firemen's Ins. Co.*, 76 N.M. 430, 415 P.2d 553 (1966). Compare the similar holding under the federal act, *Brillhart* v. *Excess Ins. Co. of America*, 316 U.S. 491 (1942).

suit would be decided by the state courts at all, even if this Court *did* order abstention. If not, then after a lengthy delay the Court of Appeals' original ruling would have to stand, and this trespass action would finally return to the District Court for trial and, no doubt, another round of appeals. Meanwhile, the water continues to flow through the illegal pipeline.

The possibilities implicit in "an exercise of this Court's power of supervision" are strongly reminiscent of Mr. Justice Brennan's dissenting observation in *Thibodaux*:

> "I think it is more than coincidence that both in this case and in *Mashuda* the party supporting abstention is the one presently in possession of the property in question. . . . One must regret that this Court's departure from the long-settled criteria governing abstention should so richly fertilize the Power and Light Company's strategy of delay which has now succeeded, I dare say, past the fondest expectation of counsel who conceived it." 360 U.S. at 43-44.

CONCLUSION

For the foregoing reasons, Respondent respectfully submits that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967

No. 1328

KAISER STEEL CORPORATION,
a Nevada Corporation,
Petitioner,

vs.

W. S. RANCH COMPANY,
a New Mexico Corporation,
Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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ARGUMENT

In accordance with Rule 24(4) of the United States Supreme Court Rules, Rule 24(4), 28 U.S.C., Petitioner will reply only to those arguments first raised in the Brief in Opposition to the Petition for a Writ of Certiorari. No reply will thus be made to Points III or IV.

Respondent characterizes itself as a righteous landowner whose property has been invaded by Petitioner, as in the days of the Old West when might made right. By an excursion outside the record, Respondent asserts that Petitioner failed to negotiate with it prior to constructing the pipeline and well and speculates as to why no condemnation action was filed. Although we deem such matters to be irrelevant in determining whether certiorari should be granted, a response is invited and justified to place the matters in proper perspective.

The uncontroverted affidavit filed by Petitioner below reveals that the challenged pipeline and diversion well were constructed entirely within the right of way of the Atchison, Topeka & Santa Fe Railway Company and upon the lands acquired by the railroad through condemnation proceedings in the United States District Court for the District of New Mexico (Tr. 2, R. 13), and not upon land in which Respondent held a clear fee simple interest as it would have this Court infer. By reason of the disposition of the condemnation action, the Railway obtained a determinable fee in the lands involved herein, and Respondent was left with a mere possibility of reverter upon the railroad's abandonment of use of the land for railroad purposes. *Prince* v. *Charles Ilfeld Co.*, 72 N.M. 351, 383 P.2d 827 (1963).

Respondent's speculation as to why Petitioner did not negotiate with it or condemn the land is obviously misleading since Petitioner was under no duty or obligation to negotiate with Ranch. Furthermore, New Mexico law placed no burden upon Petitioner to institute prior condemnation proceedings since the inverse condemnation statute, Sec. 22-9-22, N.M.S.A. 1953, provides a plain and adequate remedy for the "landowner" in an action to be instituted

by it, and not by the proposed condemnor. Due to the efforts of the same attorneys representing Respondent here, the New Mexico Supreme Court has unequivocally ruled that inverse condemnation is the landowner's exclusive remedy and that a common law action is barred. *Zobel* v. *Public Service Company*, 75 N.M. 22, 399 P.2d 922 (1965).

POINT I

The Court of Appeals Has Decided a Vital State Constitutional Issue in a Manner Which Is or May Be in Conflict with Applicable State Law

An examination of the opinions of the District and Circuit Courts so clearly reveals that the question of state law is unsettled and difficult of resolution, and that the decision by the Tenth Circuit will have an adverse economic effect upon the State, that no further reply is necessary to Respondent's unsupported contentions to the contrary.

POINT II

The Decision of the Court of Appeals Is in Conflict with Applicable Decisions of This Court

Respondent's misinterpretation of the law governing abstention is amply demonstrated by its citation of *Louisiana Power & Light Co.* v. *City of Thibodaux*, 360 U.S. 25 (1959) in support of its position that abstention is completely a matter of discretion. While it is true that there are certain areas of discretion, that rule does not apply here where the decision by the federal court interferes with sovereign prerogative in the areas of conservation and development of water in an arid state, delegation of the power of eminent domain, and promotion and protection of economic development. In *Thibodaux*, this Court recognized that under certain circumstances it had:

> ". . . *required* District Courts, and not merely sanctioned an exercise of their discretionary power, to stay their proceedings pending the submission of the state law question to state determination." (Emphasis added)

Even if abstention here were wholly a matter of discretion, failure of the Tenth Circuit Court of Appeals to abstain under the circumstances of this case, constitutes a clear abuse of such discretion.

If it were not for the fact that *Thibodaux* and *County of Allegheny* v. *Frank Mashuda Co.*, 360 U.S. 185 (1959), were decided on the same day, one might infer that Respondent contends that *Thibodaux* is no authority whatsoever and that it was effectively overruled by *Mashuda*. As a matter of fact, however, *Mashuda* involved no constitutional question, and the Court's decision was premised upon the express grounds that the State law was clear and settled and that the only question to be determined was a purely factual one of whether or not the land was taken for a private or public use. Any similarity between that case and the questions involved here is purely superficial. To say, as Respondent does, that:

> ". . . all that is involved is the availability of an easement by condemnation of another's land"

is a gross oversimplification.

POINT V

The Importance of the Question and the Departure in the Decision Below from Accepted and Usual Principles Governing the Resolution of Controversies in Our Federal System Call for an Exercise of This Court's Power of Supervision

Respondent asserts that abstention should be denied because of the possible delay involved, and because there

is a strong likelihood that the New Mexico Courts would refuse to decide the question even if abstention were ordered. What delay may occur if abstention is granted seems clearly to be overridden by the serious effects on a multitude of interests if abstention is denied. Refusal to abstain would seriously affect New Mexico's policies of conserving and distributing to beneficial uses its scarce water supply and promoting economic development to the benefit of all its citizens. When the entire economy of a state may be adversely, and perhaps unjustifiably, affected, abstention should not be denied because of delay and expense to one individual. This is not a case where the party requesting abstention is in possession of the property in the sense of *Thibodaux* or *Mashuda*. Nor is this a situation where delay would have a "chilling effect" on a basic constitutional guarantee such as freedom of speech; in fact, a refusal to abstain will have a "chilling effect" upon New Mexico's economic development. Respondent has not been ousted from his land by Petitioner; the pipelines, after all, are underneath the ground and are entirely upon property in which a third party has a fee interest.

The proposition that the State Court will refuse to entertain jurisdiction in the declaratory judgment action is equally untenable. The suit in Colfax County was brought under the New Mexico Declaratory Judgment Statute, Section 22-6-1, N.M.S.A. 1953, the provisions of which are substantially identical to the Federal Declaratory Judgment Act, 28 U.S.C., Section 2201. See *National Liberty Insurance Co. of America* v. *Silva*, 43 N.M. 283, 92 P.2d 161 (1939). While the New Mexico trial courts have discretion in entertaining jurisdiction in a declaratory judgment action, the State Supreme Court has held that jurisdiction should be entertained and exercised when the judgment will serve a useful purpose in clarifying and settling the

legal relations in issue and will terminate and afford relief from the uncertainty, insecurity and controversy giving rise to the proceeding. *National Liberty Insurance Co. of America* v. *Silva, supra;* see also *Maryland Casualty Company* v. *Pacific Coal and Oil Company,* 312 U.S. 270 (1941). That such criteria are present here cannot be seriously questioned. It is inconceivable that the state court would decline to exercise jurisdiction to decide such a crucial issue of state law where the federal court in which the action initially was pending has declined to exercise its jurisdiction to allow the state court to rule definitely on the question.

CONCLUSION

For the foregoing reasons, and those set forth in full in the Petition, it is respectfully submitted that the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

No. 1328. Decided June 3, 1968.

PER CURIAM.

Respondent brought this diversity suit in the United States District Court for the District of New Mexico, claiming an illegal trespass by petitioner and seeking damages and an injunction. Petitioner admitted the alleged trespass but claimed it was authorized to do this by N. M. Stat. Ann. § 75–1–3 (1953), in order to use water rights it had been granted by the State. Respondent contended that if § 75–1–3 were construed to authorize condemnation of private land to secure water for a private business, the law would violate the New Mexico Constitution, which permits the taking of private property only for "public use." N. M. Const., Art. II, § 20. The crucial issue thus became the interpretation of the term "public use" in the State Constitution. The District Court held that the property had been taken for a public use, rejecting the suggestion in petitioner's brief that the action be stayed pending decision of the crucial question by the state courts. The Court of Appeals reversed on the merits, 388 F. 2d 257 (1967), and rejected petitioner's motion to stay the federal court's action until the state law issues could be settled in a declaratory judgment suit then pending in the state courts, 388 F. 2d 262 (1968).

The Court of Appeals erred in refusing to stay its hand. The state law issue which is crucial in this case is one of vital concern in the arid State of New Mexico, where water is one of the most valuable natural resources. The issue, moreover, is a truly novel one. The question will

eventually have to be resolved by the New Mexico courts, and since a declaratory judgment action is actually pending there, in all likelihood that resolution will be forthcoming soon. Sound judicial administration requires that the parties in this case be given the benefit of the same rule of law which will apply to all other businesses and landowners concerned with the use of this vital state resource.

The writ of certiorari is granted, the judgment of the Court of Appeals is reversed, and the case is remanded with directions that the action be stayed in accordance with the prayer of petitioner. Federal jurisdiction will be retained in the District Court in order to insure a just disposition of this litigation should anything prevent a prompt state court determination.

It is so ordered.

MR. JUSTICE BRENNAN, whom MR. JUSTICE DOUGLAS and MR. JUSTICE MARSHALL join, concurring.

I concur solely on the ground that this case presents one of the "narrowly limited 'special circumstances'" which justify the invocation of "the judge-made doctrine of abstention," *Zwickler* v. *Koota*, 389 U. S. 241, 248. The "special circumstances," as the Court states, arise from the fact that "[t]he state law issue which is crucial in this case is one of vital concern in the arid State of New Mexico, where water is one of the more valuable natural resources." Cf. *Alabama Public Service Comm'n* v. *Southern R. Co.*, 341 U. S. 341; *Burford* v. *Sun Oil Co.*, 319 U. S. 315; see *Zwickler* v. *Koota*, *supra*, at 249, n. 11. I adhere however to my view, expressed in dissent in *Louisiana Power & Light Co.* v. *City of Thibodaux*, 360 U. S. 25, 31, that in a diversity case abstention from decision of a state law question is improper in the absence of such "special circumstances."